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ANDRÁS KOLTAY – ANDREJ ŠKOLKAY (EDS)

COMPARATIVE MEDIA LAW PRACTICE

MEDIA REGULATORY AUTHORITIES IN THE VISEGRAD COUNTRIES

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Comparative Media Law Practice

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Poland and Hungary

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I. Introduction

The idea of this paper is to analyse the approach of the courts in Poland to sanctions imposed by the Chairman of the National Broadcasting Council (Krajowa Rada Radiofonii i Telewizji, KRRiT) upon broadcasters for exceeding the limits of freedom of speech. In order to present this issue thoroughly and transparently, this part is subdivided into further parts. It should be emphasized, however, that the numbers of these parts indicated in the introduction do not always correspond with the numbers that they are assigned in the analysis. This difference is intentional, and aimed at distinguishing the most important topics.

The analysis starts with a short description of the legal system in Poland, with reference to its most important constitutional principles. It also contains an introduction to the sources of law and the judicial system in Poland. This part of the analysis is aimed at acquainting the reader with the main rules of Polish legal system. Such knowledge is necessary to understand the idea and scope of the regulations that pertain to radio and television in Poland.

The second part of this paper concerns the radio and television market in Poland, concentrating on their history and development. The structure of the broadcast media market is also outlined, and the main players are introduced. This information will help the reader to understand how the radio and television market functions in Poland.

The third part of the analysis presents the regulations of Polish law that pertain to radio and television. An introduction to the terminology and tasks of radio and television is followed by an overview of the provisions regulating the specific types of media. The aims of public broadcasting organizations are then contrasted with the aims of other broadcasters. This part also describes the provisions of the Broadcasting Act (BA) regulating the licensing system, ie, the procedure of granting a broadcasting licence, the list of criteria that should be taken into account by the Chairman of the KRRiT when deciding on a licence as well as the procedure of revoking a broadcasting licence. Finally, the rules of registration of programmes transmitted exclusively in information and communications technology systems are mentioned in this part.

The fourth part of the analysis concerns the regulation of the content of programmes and other broadcasts. It starts with an introduction to the general provisions pertaining to the content of commercial communications and to the specific rules regulating the content of specific forms of them: advertising, sponsorship, teleshopping, and product placement. This part of the analysis also reviews general provisions pertaining to the content of programmes and other broadcasts. It also contains a description of the special rules concerning the content of on-demand audiovisual media services.

The fifth part is dedicated to the KRRiT. It starts with a description of its legal status within the Polish constitutional system, including a description of the regulations aimed at guaranteeing the independence of the KRRiT. The procedure for electing members of the KRRiT as well as its aims and tasks are discussed here. A special reference is made to the Chairman of the KRRiT who carries out important tasks of supervisory nature. This part is of special importance to this research due to the fact that it is the Chairman who is authorized by statute to impose fines for exceeding the limits of the freedom of speech. The summary of this part includes deliberations on how the aforementioned activity of the Chairman is assessed in Poland.

The sixth part of the analysis concerns regulations on appeals against the decisions of the Chairman which impose fines for exceeding the freedom of speech. It is important to emphasize that in Poland, such decisions are not reviewed by administrative courts but by

the Regional Court in Warsaw—the Commercial Court (RC). The Regional Court has the status of a common (civil) court that in case of an appeal against the decision of the Chairman proceeds according to the provisions of the Code of Civil Procedure (CCP).[1] Therefore, an appeal against the decision of the Chairman commences civil proceedings that are focused on settling the dispute between the media service provider who is the addressee of an administrative decision and the Chairman who issued the decision. Thus this proceeding does not aim to review the legality of the Chairman's decision, and the proceedings issuing it are in turn typical of appeal proceedings before the administrative courts. This part of the analysis also contains a description of the proceedings before the Court of Appeal in Warsaw (CA) that examines appeals against the judgments of the RC. Finally, the cassation proceeding that starts before the Supreme Court (SC) once a complaint against the judgment of the CA has been filed is discussed here. It is important for the purposes of this to make a thorough introduction to the regulations concerning the appeals process against the decisions of the Chairman of the KRRiT, appeals against the judgments of the RC, and cassation complaints against the judgment of the CA.

The freedom of speech is the subject of the seventh part of this analysis. It starts with a description of the provisions that concern the freedom of speech and the limits thereof, namely the Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR)[2] and the International Covenant on Civil and Political Rights (ICCPR)[3] as well as the provisions of Polish law. This part is subdivided into parts concerning human dignity, hate speech, balanced coverage, commercial communications, protection of minors and right of reply. Each of these parts follows the same structure. It starts with an analysis of the regulations that pertain to the said issue and closes with an analysis of the cases concerning this issue. The analysis of the cases also has a unified structure in the interests of clarity. Hence its structure is as follows: a description of the case, the argumentations of the Chairman of the KRRiT, the argumentations of the broadcaster, the judgment of the RC, the judgment of the CA (if it was given) and the judgment of the SC (if it was given).

The analysis of the aforementioned judgments is aimed at answering the following research questions. First, is preference given to the freedom of speech or rather to other human rights by the courts in Poland? Second, which human rights or freedoms are protected by the courts in Poland at the cost of safeguarding the freedom of speech? Third, what is the moral and legal justification applied for such a preference? Fourth, are courts consistent in their judgments? Fifth, which legal sources are used by the courts in Poland in order to justify their judgments?

II. Legal System of Poland

The most important act in Polish legal system is the Constitution,[4] which contains the key principles of the functioning of the state. By and large it draws on the principles and values that are typical of modern western democracies. Some parts of the Constitution,

1 Ustawa z dnia 17 listopada 1964 r. – Kodeks postępowania cywilnego, Dz.U. 1964, Nr 63, Poz. 296.
2 Konwencja o ochronie praw człowieka i podstawowych wolności z 4 listopada 1950 r., Dz.U. 1993, Nr 61, Poz. 284.
3 International Covenant on Civil and Political Rights, 16 December 1966, Dz.U. 1977, Nr 38, Poz. 167.
4 Konstytucja Rzeczypospolitej Polskiej z dnia 2 kwietnia 1997 r., Dz.U. 1997, Nr 48, Poz. 483.

however, are clearly inspired by Poland's constitutional tradition and history.[5] One of the most important principles stated in the Constitution is that the Nation holds the supreme power in Poland (Article 4). Another principle of high importance in the Constitution is that Poland is a democratic state ruled by law, which implements the principles of social justice (Article 2). Chapter II of the Constitution pertains to the system of human and civil rights and freedoms. It regulates three groups of such rights and freedoms. The first group consists of personal rights and freedoms, ie, the right to life (Article 38), the freedom and privacy of communication (Article 49), and the right of inviolability of the home (Article 50). The second group consists of political rights and freedoms. It includes, eg, the freedom of association in trade unions, socio-occupational organizations of farmers and in employers' organizations (Article 59), and the right of access to public service based on the principle of equality (Article 60). The third group contains economic, social, and cultural rights and freedoms, and includes, among others, the right to ownership (Article 64) and the freedom to carry out economic activity (Article 22). All human and civil rights and freedoms listed in the Constitution are guaranteed by the state and defended by means described in Articles 77–81 of the Constitution.

The system of government of Poland is based on the principle of separation of and balance between the legislative, executive, and judicial powers. The legislative power is exercised by the Sejm and the Senate, the executive power by the President and the Council of Ministers, and the judicial power by the courts and tribunals (Article 10).

The Constitution regulates the system of the organs of state control and for the defence of rights, consisting of the Supreme Chamber of Control (Article 202), the Commissioner for Citizens' Rights (Article 208), and the KRRiT (Article 213).

The sources of law in Poland can be divided into universally binding law, internal law, and local law. Universally binding law means law that can be the basis for the regulation of the legal situation of a person by means of court verdicts and administrative decisions.[6] The catalogue of sources of universally binding law is exhaustive. It contains only acts stipulated in the Constitution, statutes, ratified international agreements and regulations (Article 87(1)), local law (Article 87(2)), laws established by international organizations (Article 91(3)), and regulations with the force of a statute issued by the President during a period of martial law (Article 234). Internal law means law addressed exclusively to organizational units that are subordinate to the body that issues a given legal act. It cannot regulate individual rights and obligations.[7] There are two types of internal law acts mentioned in the Constitution: resolutions of the Council of Ministers and orders of the Prime Minister and ministers (Article 93(1)). Acts of internal law must conform to the universally binding law.

The Polish system of sources of law is hierarchical in nature. The supreme source of law in Poland is the Constitution adopted in 1997 (Article 8). Statutes, after Constitution, are another principal source of the law, and are the basic form of passing universally binding legal provisions. A statute is an act of the Parliament containing general and abstract legal norms. Some matters must be completely regulated by statute.

5 L Garlicki, 'Constitutional law' S Frankowski (ed), *Introduction to Polish Law* (The Hague, Kluwer Law International, 2005) 4.

6 K Prokop, *Polish Constitutional Law* (Białystok, Temida 2, 2008) 26.

7 ibid.

Ratified international agreements are another source of Polish law. The ratification and cancellation of international agreement stays within the competences of the President (Article 133(1)1). Before ratifying or withdrawing from an international agreement, in the situations described in Article 89 of the Constitution, the President is required to obtain the prior consent of the Sejm by means of statute. Once ratified, an international agreement constitutes a part of the domestic legal order, and it is applied directly unless its application requires the adoption of a statute (Article 91(1)). Moreover, an international agreement ratified upon prior consent granted by statute has precedence over statutes in case of conflicting provisions (Article 91(2)). International agreements ratified without the consent of the Sejm are subordinated to statutes with conflicting provisions. Laws established by international organizations founded by agreement and ratified by Poland are subject to special regulation. If such an agreement states the supremacy of such laws over Polish law, they have precedence in the event of a conflict of laws (Article 91(3)).

Regulations are acts of executive nature. They can only be issued on the basis of specific authorization contained in the statute, and only in order to implement its provisions. Such authorization should specify the organ responsible for issuing the regulation, the scope of matters to be regulated, and the guidelines concerning provisions of such an act (Article 92(1)).

Local law means law adopted by entities of the local government or units of the government administration in their territory. Acts of local law have the status of universally binding law, but only in the territory of the organ issuing such an enactment (Article 87(2)). Acts of local law may be adopted on the basis of and within limits specified by statute. They may be issued by organs of local government and by territorial organs of government administration (Article 94).

The judicial power in Poland is vested in courts and tribunals (Article 10). They constitute a separate power, and are independent of other powers (Article 173). The structure of court proceedings reflects the principle of at least two instances of legal proceedings (Article 176(1)).

The system of courts in Poland consists of the SC, the common courts, the administrative, courts, and the military courts (Article 175(1)). The catalogue of court types cited in the Constitution is closed. Pursuant to Article 177 of the Constitution, common courts of law have jurisdiction in all cases except those statutorily reserved for other courts. Thus, if it is impossible to determine which court should hear a case, it is presumed that it is the common court of law. The system of common courts in Poland consists of district courts (*sądy rejonowe*), regional courts (*sądy okręgowe*) and appeal courts (*sądy apelacyjne*). The Supreme Court is located at the top of the system of common courts in Poland, it supervises the judgments of common and military courts by examining cassation complaints (Article 183(1)).

The system of special courts consists of military courts and administrative courts. Military courts make judgments in criminal cases involving soldiers, and they are supervised by the SC. The system of administrative courts is composed of the Supreme Administrative Court and other administrative courts. They are responsible for exercising, to the extent specified by the statute, control over the performance of public administration (Article 184), eg, assessing the legality of administrative decisions.

There are two tribunals in Poland: the Constitutional Tribunal and the State Tribunal. The scope of competences of the State Tribunal is limited to adjudicating upon the constitutional responsibility of persons listed in the Constitution. One of the main tasks of the Constitutional Tribunal is the hierarchical control of legal norms, by making judgments on the conformity of normative acts to acts of higher rank (Article 188). The Constitutional

Tribunal assesses whether the content of a legal norm is in conformance with the content of a norm of a higher rank, whether the normative act was issued following the appropriate procedure, and whether it was issued by an authorized body. The Constitutional Tribunal also gives judgments in cases where a constitutional complaint has been lodged. A constitutional complaint may be submitted by anyone whose constitutional freedoms or rights have been infringed, ie, all persons who are vested with constitutional freedoms or rights. In cases where a constitutional complaint was lodged, judgments of the Constitutional Tribunal concern the conformity to the Constitution of a statute or another normative act upon which basis a court or body of public administration has made a final decision relating to the freedoms, rights, or obligations specified in the Constitution (Article 79). Judgments of the Constitutional Tribunal are universally binding and final (Article 190(1)). Judgments relating to the control of legal norms are immediately published in the same official journal in which the normative act was promulgated (Article 190(2)).

III. The Broadcast Media—Their Viewership / Listeners, History, Political, and Social Impact

A. History of Media in Poland

One of the most important dates in the history of broadcast media in Poland is 1989. The political and social events that occurred at that time initiated 'the process of creating free media in Poland'.[8] The legislative changes[9] that followed the political and social transformation enabled the development of the media. One of the most important acts at the time abolished the state's monopoly on broadcasting.[10] The Act on radio and television broadcasting (BA),[11] that is currently binding, was passed in 1992. It created the legal framework for the functioning of electronic media in Poland first and foremost by abolishing the monopoly of the state on radio and television. In consequence, the range and amount of radio and television broadcasting in Poland started to increase when in 1993 the first broadcasting licences were granted. Another important date for the development of the radio and television market in Poland was July 2013, when the last transmitters of TV analogue signals were switched off. Currently the whole country is covered by terrestrial digital signals. In 2013 the digitalization of radio also started in Poland. As regards the freedom of speech in Poland, its final scope was determined only in 1997 when the Constitution of Poland[12] entered into force.

8 B Secler, 'Konsekwencje przemian roku 1989 dla środków społecznego przekazu w Polsce – wybrane problemy' *Media Dawne i Współczesne* 1 (2011) 63.

9 Starting with Ustawa z dnia 11 kwietnia 1990 r. o uchyleniu ustawy o kontroli publikacji i widowisk, zniesieniu organów tej kontroli oraz o zmianie ustawy – Prawo prasowe, Dz.U. 1990, Nr 29, Poz. 173.

10 Ustawa z dnia 23 listopada 1990 r. o łączności, Dz.U. 1990, Nr 86, Poz. 504.

11 Ustawa z dnia 29 grudnia 1992 r. o radiofonii i telewizji, Dz.U. 1993, Nr 7, Poz. 34.

12 For a thorough analysis of legislative works on the constitutional provisions pertaining to the freedom of speech, see, R Chruściak, *Konstytucjonalizacja wolności mediów, wolności wypowiedzi oraz Krajowej Rady Radiofonii i Telewizji. Kształtowanie przepisów konstytucyjnych i ustawowych* (Warszawa, Elipsa, 2004) 13 and n.

B. Media Market in Poland

The media market in Poland is divided into radio and television. The market of radio is shared between the public broadcaster (Polskie Radio) and regional radio companies as well as licensed broadcasters. According to the latest information from the KRRiT,[13] there are four radio groups present on the Polish media market: RMF, EUROZET, TIME, and AGORA. Only two of these groups broadcast nationwide programmes on the radio: RMF FM (RMF Group) and Radio ZET (EUROZET). Every media group mentioned above broadcasts specialised programmes on the following radio stations: RMF Classic, which belongs to the RMF, transmits classical music; Chilli ZET, a radio station belonging to the EUROZET, transmits chill out and jazz music; Radio VOX FM (formerly Eska ROCK), which belongs to the TIME media group, and radio TOK FM, which belongs to the AGORA group, are not as focused on musical programmes but rather on providing information. There is also a variety of local radio stations in Poland, eg, RMF MAXXX, Planeta, Antyradio, Radio ESKA, Radio WAWA, Złote Przeboje and Roxy. Apart from the radio broadcasters mentioned above, there is a group of local broadcasters that belong to self-governmental institutions, academic organizations, and religious institutions.

The market of television in Poland is also shared between the public broadcaster (Telewizja Polska, TVP) and commercial broadcasters. There are four nationwide channels of TVP: TVP 1, TVP 2, TVP INFO, and TVP POLONIA (the latter is also transmitted abroad). According to the latest information from the KRRiT[14] there are two main commercial broadcasters present on Polish media market: POLSAT and TVN, and several satellite and local broadcasters. Television programmes are transmitted specifically by Telewizja Polsat Sp. z o.o.; TVN S.A.; Telewizja PULS Sp. z o.o.; Superstacja Sp. z o.o. and Mediasat Sp.zo.o. Digital platforms in Poland are also developing rapidly. Currently the following platforms are present on the market: Cyfra+, Canal + Cyfrowy Sp. z o.o., and N platform.

The market of on-demand audiovisual media services is still underdeveloped in Poland. Providers of such services mainly offer access to movies. Such services are offered by Tvnplayer, vod.tvp.pl, Cineman.pl, ipla.pl, HBO on Demand, Vectra VoD, kinoplex.gazeta.pl, Multimedia, Toya VoD, Dialog, Inea VoD, and videon.pl.[15]

In terms of the popularity of the various categories of programmes, viewers prefer entertainment broadcasts, sports, comedy series, and feature films.[16] It is worth noting that programmes of religious nature have mainly female viewers, and are popular among people over the age of sixty.[17] Radio Maryja, which is owned by the Order of Redemptorist Fathers (Warszawska Prowincja Redemptorystów), has gained popularity since the 1990s thanks to the Radio's charismatic director Tadeusz Rydzyk. Its success as a Catholic media outlet

13 Informacja o podstawowych problemach radiofonii i telewizji w 2013 roku, KRRiT Warszawa 2014, http://www.krrit.gov.pl/Data/Files/_public/Portals/0/sprawozdania/informacja.pdf.

14 Informacja KRRiT 2013.

15 ibid, 50.

16 Najpopularniejsze audycje w III kw. 2012 roku. Dobowa oglądalność programów – raport, KRRiT, Warszawa 2012.

17 Widownia programów Polo TV, Eska TV, TTV, TV6 oraz TV Trwam i Telgivia.tv w okresie: 1stycznia – 19 lutego 2012 – raport KRRiT (2012) 5.

was repeated by Trwam TV also under the supervision of Rydzyk. Both media outlets are deemed controversial due to the opinions they represent. Other Catholic media were not that popular, and had to cease their activity.[18] Radio programmes in Poland are mostly musical in content.[19] They also provide various types of information, mainly rapid news services.

IV. Key Principles of Electronic / Digital Media Regulations

A. Radio and Television—Terminology and Tasks

The BA defines the tasks of radio and television as providing information, ensuring access to culture and art, facilitating access to learning, sport and scientific achievements, disseminating civil education, and providing entertainment promoting the domestic production of audiovisual works (Article 1(1)). All these tasks are performed by providing media services (Article 1(1)a).

A media service means a service in the form of a programme service or an on-demand audiovisual media service that is under the editorial responsibility of its provider, and the principal purpose of which is the provision of programmes, in order to inform, entertain, or educate, to the general public by telecommunications networks (Article 4(1)). Provision of a media service is defined in the BA as the transmission of a programme service or the provision of an on-demand audiovisual media service to the general public (Article 4(9)). Transmission of a programme service in turn means transmitting it over the air or by wire for reception by the general public (Article 4(7)). The provision of an on-demand audiovisual media service to the general public is described as the provision of such a service in a manner enabling the general users, at a time preferred by them and at their request, to receive a programme of their choice selected from the catalogue of programmes provided as a part of such a service (Article 4(8)a).

A media service provider can be either a natural person or a legal person or partnership that has editorial responsibility as regards the choice of the content of the media service, and which determines the manner in which it is organised. The media service provider can be a broadcaster or a provider of an on-demand audiovisual media service (Article 4(4)). A broadcaster is defined as a natural person, legal person or partnership that produces or organises a programme service, and transmits it or has it transmitted by other persons (Article 4(5)). It is worth indicating that the definition of broadcaster in the BA differs from the definition of broadcaster contained in Directive 2010/13/EU.[20]

The BA distinguishes a special category of social broadcasters, ie, those who fulfils the criteria listed in Article 4(10). First, social broadcasters propagate learning and educational activities, promote charitable deeds, respect the Christian system of values, being guided by the universal principles of ethics, and strive to preserve the national identity of programme services. Second,

18 For examples, see, Secler, 'Konsekwencje' (n 8) 71–72.

19 Rynek radiowy w Polsce. Przegląd na podstawie danych z 2011 – raport KRRiT (2012) 3.

20 Dyrektywa Parlamentu Europejskiego i Rady z dnia 10 marca 2010 r. Nr 2010/13/UE w sprawie koordynacji niektórych przepisów ustawowych, wykonawczych i administracyjnych państw członkowskich dotyczących świadczenia audiowizualnych usług medialnych (dyrektywa o audiowizualnych usługach medialnych), Dz.U. L 95 z 15 kwietnia 2010 r.

they do not transmit programmes or other broadcasts containing scenes or contents which may have an adverse impact upon the healthy physical, mental or moral development of minors. Third, they do not transmit commercial communications. Fourth, social broadcasters do not charge any fees for the transmission, retransmission or reception of the programme service.

An on-demand audiovisual media service is a media service provided within the frame of business operations carried out for this purpose, consisting in the provision of audiovisual programmes to the general public in accordance with the catalogue of programmes created by the service provider (Article 4(6)a). The BA does not provide for the definition of an on-demand audiovisual media service provider.

B. Types of Regulated Media

The BA regulates the right to transmit radio and television programme services. Three categories of subjects are entitled to transmit radio and television programme services.First, by virtue of the provisions of the BA, public broadcasting organizations are vested with this right. Second, natural persons, legal persons, and partnerships that have received a broadcasting licence are vested with it. Third, in the case of television programme services transmitted exclusively by information and communications technology systems, programmes that have been entered the register of such programme services are vested with it (Article 2(1)). With this in mind, it is worth indicating that the BA's provisions pertain to three categories of broadcasters, ie, public radio and television, holders of broadcasting licences, and entities transmitting registered television programme services. Thus, the three categories of entities are subject to the provisions of the BA regardless of who their owner is. It should be mentioned, however, that the aims of every group of broadcasters are different, therefore there are special provisions of the BA that pertain only to certain categories of broadcasters.

The BA provisions are applied to media service providers established in the territory of Poland (Article 1a(1)). By media service providers established in Poland, the legislator means all media providers that fulfil the specific requirements described in Article 1a of the BA. However, the BA provisions are also applied to media service providers that are not established in Poland but use satellite uplink station situated in Poland or satellite links that belong to Poland (Article 1a(4)).

C. Public Radio and Television

Public broadcasting organisations operate exclusively in the form of the sole-proprietor joint stock company of the State Treasury (Article 26(1) of the BA). Public television is formed by the company Telewizja – Polska Spółka Akcyjna, established for the purpose of producing and transmitting national programme services: I, II, TV Polonia and regional television programme services (Article 26(2)). Public radio is formed by a company called Polskie Radio – Spółka Akcyjna, established in order to produce and transmit national radio programme services and programme services for receivers abroad. Public radio also consists of regional radio companies founded to produce and transmit regional radio programme services (Article 26(3)).

The aims and tasks of public radio and television are different from those of other broadcasters. The legislator describes them as carrying out a public mission. This means that they provide the entire society and its individual groups with diversified programme services and other services in the areas of information, journalism, culture, entertainment, education, and sport. The programmes provided by public radio and television are required to fulfil special conditions, in that they must be pluralistic, impartial, well balanced, independent, innovative as well as marked by the high quality and integrity of the broadcasts (Article 21(1)). Moreover, they should be guided by a sense of responsibility for the content of the message and by the need to protect the good reputation of public radio and television; provide reliable information about the vast diversity of events and processes taking place in Poland and abroad; encourage an unconstrained development of the citizens' views and the formation of public opinion; enable citizens and their organizations to take part in public life; assist the development of culture, science, and education; respect the Christian system of values; serve to strengthen family ties; advance the propagation of a pro-health attitude; serve to promote and popularize sport; contribute to combating social pathologies, and contribute to media education (Article 21(2)).

D. The System of Licensing / Registration

Broadcasters other than the public broadcasting organizations described above are required to hold a broadcasting licence in order to transmit programme services (Article 33(1) of the BA). The licence is not required for transmitting television programme services exclusively in information and communications technology systems unless they are to be retransmitted by terrestrial diffusion, satellite, or cable networks (Article 33(1)a).

The body responsible for awarding broadcasting licences is the Chairman of the KRRiT (Article 33(2)). The Chairman adopts decisions concerning broadcasting licences on the basis of the KRRiT resolution. Such decisions are final (Article 33(3)). As a general rule, a broadcasting licence may be granted to natural persons of Polish nationality who permanently reside in the territory of Poland, and to legal persons or partnerships having their seat in the territory of Poland (Article 35(1)). A broadcasting licence may also be awarded to companies with foreign shareholders, foreign persons, and their subsidiaries provided that they fulfil the conditions described in Articles 35(2)–(3) of the BA. The BA provides for the list of criteria that the Chairman is obligated to take into account adopting a decision on broadcasting licences. The catalogue of these criteria is not exhaustive, and refers in particular to the applicant's ability to make the necessary investments and guarantee financing of the programme service; the planned share of programmes produced or commissioned by the broadcaster or co-produced by the broadcaster jointly with other broadcasters in the programme service; and the past compliance of the applicant with regulations pertaining to radio communications and mass media (Article 36(1)). Furthermore, the Chairman is obligated to refuse to grant a licence if transmission of a programme service by the applicant could result in a threat to the interests of national culture, transgression of the standards of public decency, a danger to national security and defence or a threat to the security of classified information. It is also obligatory to refuse the broadcasting licence if granting it could lead to the applicant's dominant position in the mass media in the given area (Article 36(2)).

Besides the conditions of granting a broadcasting licence, the BA regulates those of the revocations as well. The legislator distinguishes two situations—cases in which the licence must be revoked and cases in which the licence may be revoked. For instance, the Chairman of the KRRiT is obligated to revoke a licence if a final decision has been issued prohibiting the broadcaster from carrying out the business activity covered by the licence; the broadcaster blatantly violates the conditions set forth in the BA or a licence; the activity covered by the licence infringes the provisions of the BA or the terms of the licence, and the broadcaster did not correct this situation or alter its legal status accordingly within a prescribed time-limit (Article 38(1)). The Chairman is entitled to revoke a broadcasting licence in cases when the transmission of the programme service threatens the interests of national culture, the security and defence of the nation, or if it transgresses the standards of public decency; the broadcaster is declared bankrupt; by transmitting the programme service, the broadcaster gains a dominant position in mass media on the given relevant market; or another person takes direct or indirect control over the activity of the broadcaster (Article 38(2)).

The transmission of certain television programme services requires registration in the register kept by the Chairman of the KRRiT. This obligation concerns programmes transmitted exclusively in an information and communications technology system (Article 41(1)).

E. Content Regulation

The BA states the rule of the broadcaster's full independence in determining the content of the programme service and responsibility for its contents (Article 13(1)). There are, however, some exceptions to this rule concerning a third party liability for the content of particular programmes, advertising or other broadcasts (Article 13(2)).

The BA provides for extended rules pertaining to commercial communications. These are defined as any broadcasts including images with or without sound or with sounds only. The aim of the aforementioned broadcast should be the promotion, in a direct or indirect way, of the goods, services, or image of an entity pursuing an economic or professional activity. In order to be considered commercial communications, the broadcast should accompany or be included in a programme in return for payment or for similar consideration, or for self-promotional purposes on the part of broadcasters.

The BA enumerates several examples of commercial communications: advertising, sponsorship, teleshopping, and product placement. It states, however, that the catalogue of examples of commercial communications is not exhaustive, and contains solely the most typical kinds of such broadcasts (Article 4(16)). Amongst them, advertising means commercial communications originating from a public or private entity in connection with its economic or professional activity aimed at promoting the sale or use of goods or services in return for payment (Article 4(17)). Sponsorship in turn is defined in the BA as any contribution made to programme producers by an entity not engaged in providing media services or in the production of programmes. Such contributions are aimed at promoting the aforementioned entity's name, business name, image, activities, product or service, trade mark, or any other proprietary identification (Article 4(18)). Another type of commercial communications—teleshopping—is defined as communication containing a direct offer to sell products or supply services in return for payment (Article 4(19)). Finally, product

placement in the meaning of the BA is a commercial communication that consists of the inclusion of or reference to a product, a service or the trade mark thereof so that is featured within a programme. Such inclusion or reference should be made in return for payment or for similar consideration and/or gratuitous provision of a product or service (Article 4(21)).

The BA prohibits surreptitious commercial communications (Article 16c(1)). All commercial communications should be readily recognizable (Article 16(1) BA). Advertising and teleshopping should be readily distinguishable from editorial content. Keeping them distinct from other parts of the programme service should be guaranteed by optical, acoustic, or spatial means (Article 16(2)).

In case of inserting advertising or teleshopping during a programme they cannot prejudice its integrity. Fulfilling this condition requires taking into account the natural breaks of a programme concerned and its nature, as well as the rights of the right holders (Article 16a(1)). There are, however, more restrictive rules concerning the interruption of specific kinds of programmes. First, during coverage of sports events containing mandated intervals and of other events containing intervals, advertising or teleshopping should only be inserted in the intervals (Article 16a(2)). Second, films made for television, excluding series, serials, and documentaries, as well as cinematographic works, may be interrupted by advertising or teleshopping once for each scheduled period of a full 45 minutes (Article 16a(3)). Third, other programmes than those specified above may be interrupted by advertising or teleshopping if a period of at least 20 minutes in a television programme service, and at least 10 minutes in a radio programme service, has elapsed between each successive break in the programme (Article 16a(4)). Fourth, there is an absolute prohibition of interruption by advertising or teleshopping of the following programmes: news programmes, programmes with a religious content, commentaries and documentaries the duration of which is less than 30 minutes, and children's programmes (Article 16a(6)).

The BA prohibits the broadcasting of commercial communications for the following goods and services: (a) tobacco products, tobacco accessories, their imitations, as well as symbols related to the use of tobacco; (b) alcoholic beverages; (c) medicine provided only on prescription; (d) medicinal products; (e) cylindrical games (eg, roulette), card games, dice, mutual bets and slot machines; and (f) psychoactive drugs or narcotics (Article 16b(1)). Apart from the absolute ban on broadcasting commercial communications concerning the goods and products listed above, the BA also regulates the content of commercial communications. Some of these rules concern minors, and they prohibit broadcasting commercial communications that directly exhort minors to purchase products or services; encourage minors to exert pressure upon their parents or other persons to persuade them to purchase the products or services being advertised; exploit the trust minors place in parents, teachers or other persons; unreasonably show minors in dangerous situations; and prejudice the physical, mental, or moral development of minors. Other rules pertaining to the content of commercial communications indicate that they cannot be of a subliminal nature; prejudice respect for human dignity, include any discrimination on the grounds of race, sex, nationality, ethnic origin, religion, belief, disability, age, or sexual orientation; be offensive to religious or political beliefs; or encourage behaviour prejudicial to health, safety, or environmental protection (Articles 16b(2)–(3)).

The BA prohibits product and thematic placement (Article 16c). However, it contains provisions that allow product placement if certain conditions are fulfilled. It is admissible

exclusively in two circumstances. First, in cinematographic works, films or series made for audiovisual media services, sports programmes, and light entertainment programmes. Second, in cases where there is no payment but only the provision of certain goods or services free of charge, such as production props and prizes, with a view to their inclusion in a programme. It should also be mentioned that product placement is prohibited in children's programmes even if the conditions described above are fulfilled (Article 17a(1)). The BA states the obligation to identify programmes that contain product placement with a graphic sign in the television programme services, and with an acoustic symbol in radio programme services giving notice of product placement (Article 17a(2)). If a programme contains product placement, it can neither give undue prominence to the product in question nor directly encourage the purchase or rental of goods or services (Article 17a(5)).

The BA provides for special rules pertaining to sponsorship, requiring that viewers or listeners should be clearly informed about sponsoring. Sponsored programmes or other broadcasts should be identified as such by sponsor credits at the start and at the end of the programme, as well as when the programme resumes after an advertising or teleshopping break. The above-mentioned sponsor credits can only specify the sponsor's name, business name, or trademark, or contain some other identification of the business operator or its business activities, a reference to its products, services or their trademark (Article 17(1)). This rule, however, cannot be applied to goods or services the advertising of which is prohibited (Article 17(2)). The identification of a sponsor or any component thereof cannot directly encourage the purchase or rental of goods or services, in particular by making special promotional references to those goods or services (Article 17(1)a). Also, sponsored programmes or other broadcasts cannot encourage the purchase or other use of the products or services of the sponsor, or of a third party (Article 17(4)).

Apart from the provisions pertaining to all kinds of commercial communications, advertising, teleshopping, product placement, and sponsorship, the BA also regulates the content of programmes or other broadcasts in a more general way. Under Article 18 of the BA, programmes and other broadcasts have to fulfil the following conditions. First, they cannot encourage actions contrary to the law and to the Polish reason of state, and they cannot propagate attitudes and beliefs contrary to the moral values and social interests of Poland. In particular, they cannot include contents inciting hatred or discriminating on the grounds of race, disability, sex, religion, or nationality (Article 18(1)). Second, programmes and other broadcasts should respect the religious beliefs of the public and especially the Christian system of values (Article 18(2)). Third, programmes and other broadcasts cannot encourage conduct prejudicial to health, safety, or the natural environment (Article 18(3)). Fourth, it is prohibited to transmit programmes and other broadcasts that are threatening to the physical, mental, or moral development of minors (Article 18(4)). Special rules pertain to programmes and other broadcasts containing scenes or content which may have an adverse impact upon the health and mental or moral development of minors. They can be transmitted between 11 pm and 6 am, and should be identified by way of displaying an appropriate graphic symbol throughout their duration in the television programme or by way of an oral announcement informing of the hazards arising out of their transmission in the radio (Articles 18(5)–(5)a).

Besides the provisions pertaining to radio and television programmes or other broadcasts, the BA provides for special rules concerning the content of on-demand audiovisual media services. It is worth mentioning that provisions regulating the content of on-demand

audiovisual media services are of a more lenient nature than provisions pertaining to the content of programmes. The legal literature on this subject indicates that this is due to the legislator's assumption that radio and television programmes may have wider impact on their viewers/listeners than on-demand audiovisual media services.[21] First, providers of such services are obligated to apply technical security measures or other appropriate measures to prevent minors from the reception of certain categories of programmes or other broadcasts (Article 47e(1)). Second, taking into account the degree of harmfulness of the programme or other broadcasts to minors in different age groups, the provider mentioned above has the obligation to appropriately qualify and mark programmes and other broadcasts in such a way that the user can easily see such a mark (Article 47e(2)). Third, programmes provided as a part of on-demand audiovisual media services cannot contain contents inciting hatred or discriminating on grounds of race, disability, sex, religion, or nationality (Article 47h). Fourth, commercial communications broadcasted as a part of on-demand audiovisual media service should be readily recognizable. Fifth, providers of on-demand audiovisual media service are obligated to respect the rules stated in the BA pertaining to the broadcasting of commercial communications, surreptitious commercial communications, product and thematic placement, and sponsorship (Article 47k).

V. Institutional Structure of Media Regulation in Poland

A. National Broadcasting Council

The body competent in matters of radio and television broadcasting is the KRRiT, which was established in 1992. It is worth noting that due to the fact that the KRRiT carries out a mixture of supervisory and compliance ensuring tasks, it cannot be described as a typical regulatory authority.[22] The Council consists of five members, two of which are appointed by the Sejm, one by the Senate, and two by the President. Members of the KRRiT should be chosen from persons with a distinguished record of knowledge and experience in public media (Article 7(1) of the BA). Bearing this in mind, it ought to be pointed out that the personal composition of the KRRiT reflects the state's political situation, which throws serious doubts upon the way this body carries out its tasks. The National Broadcasting Council is represented by the Chairman, elected from amongst its members (Article 7(2a)). The term of office of the KRRiT is six years from the day of appointment of the last member (Article 7(4)). The National Broadcasting Council's members cannot be appointed for another full term of office (Article 7(5)). A common opinion is that the KRRiT was projected to be a pluralistic mini-parliament where decisions are made as a political compromise. However, this idea led to the politicization of this body, and its domination by party interests.[23]

21 S Piątek, W Dziomdziora, K Wojciechowski, *Ustawa o radiofonii i telewizji. Komentarz* (Warszawa, CH Beck, 2014) 214.

22 See, G Kowalski, 'Konstytucyjna regulacja Krajowej Rady Radiofonii i Telewizji' W Lis and Z Husak (eds), *Praktyczne aspekty wolności wypowiedzi* (Toruń, Wydawnictwo Adam Marszałek, 2011) 130–31.

23 K Jakubowicz, *Media publiczne. Początek końca czy nowy początek* (Warszawa, Wydawnictwa Akademickie i Profesjonalne, 2007) 224–25.

Similarly to every regulatory authority, the KRRiT should be independent.[24] The requirement of the KRRiT's independence is ensured in particular by provisions regulating the dismissal of its members. Thus, a member can be dismissed only by the body empowered to appoint them solely in cases when the said person has resigned, has become permanently unable to discharge of duties for reasons of ill health, has been convicted of a deliberate criminal offence by a valid judgment, has submitted an untruthful screening statement as confirmed by a final and valid decision of a court, or has committed a breach of the BA provisions which has been confirmed by decision of the Tribunal of State (Article 7(6)). It is also important to emphasize the KRRiT's autonomy from the government, which is reflected in the KRRiT's obligations to report on its activity. The Council is obligated to submit annual reports on its activity to the Sejm, the Senate, and the President of Poland (Article 12(1)). The Prime Minister in turn is entitled to be provided by the KRRiT with an annual account (information) of its activities (Article 12(2)). After the report and the account are submitted by the KRRiT in accordance with its statutory obligations, only the Sejm and Senate are entitled to accept or reject the report on the KRRiT's activities (Article 12(3)). If the KRRiT's report is rejected by both the Sejm and the Senate, the term of office of all its members expires within 14 days from the date of the last resolution to this effect (Article 12(4)). It does not expire, however, unless so approved by the President of Poland (Article 12(5)).

The Council's aims are described in the Constitution, and they concern safeguarding the freedom of speech, the right to information, and safeguarding the public interest regarding radio broadcasting and television (Article 213(1)). These are the three interests the KRRiT is obligated to protect. The provisions of the Constitution are reflected in the BA that reiterates that the KRRiT safeguards the freedom of speech in radio and television broadcasting, protects the independence of media providers and the interests of the public, and ensures the open and pluralistic nature of radio and television broadcasting (Article 6(1)). The BA further describes the tasks of the KRRiT in detail, although this catalogue is not exhaustive.

The National Broadcasting Council has the status of a state authority (Article 5), nevertheless, this status is a special one. The legislator indicated this status by including constitutional provisions pertaining to the KRRiT in the chapter entitled 'Organs of state control and for defence of rights'. Taking into account the provisions of the Constitution and the BA, it is justified to describe the KRRiT as the regulatory body of the electronic media sector, which, parallel to its administrative tasks, protects and ensures the rights contained therein, as is the task of every organ of state. This mixture of different tasks has been criticized as incompatible by some legal scholars, who emphasize that an organ of state control should not be competent to establish law or to decide on the legal status of individuals.[25] It should also be mentioned that the KRRiT's Chairman also has the status of a state administration body (Paragraph 7 Reg.Org.).[26] The Council is entitled to issue regulations and adopt resolutions on the basis of the existing legislation and for the purpose of its implementation (Article 9(1) of the BA).

24 For a more extensive review, see, LK Jaskuła, 'Krajowa Rada Radiofonii i Telewizji a postulat apolityczności administracji publicznej – pułapka, wyzwanie czy szansa? (Uwagi wybrane)' J Sobczak and W Machura (eds), *Media – czwarta władza?* vol 3 (Opole, Wydawnictwo Naukowe Scriptorium, 2011) 85–99.

25 Piątek, Dziomdziora, Wojciechowski, *Ustawa* (n 21) 79.

26 Regulamin pracy Krajowej Rady Radiofonii i Telwizji, Uchwała KRRiT Nr 40/96 z dnia 16 lutego 1996 r., http://www.krrit.gov.pl/Data/Files/_public/Portals/0/KRRiT/informacje/regulamin_pracy_krrit_160296.pdf.

B. Chairman of the National Broadcasting Council

Important tasks of a supervisory nature are assigned to the Chairman of the KRRiT, who may require a media service provider to provide materials, documentation, and information to the extent necessary for the purpose of supervising the provider's compliance with the provisions of the BA, the terms of the broadcasting licence or self-regulation acts binding upon it (Article 10(2) of the BA). It is noteworthy, however, that the requirement mentioned above is not an administrative decision. Its form and the procedure for addressing it to media providers is neither regulated in the BA, nor subject to the right of appeal. The media service provider to whom such a requirement was addressed has an obligation to provide any necessary materials, documentation, and information under threat of a fine.

Furthermore, the Chairman of the BA is entitled to call upon a media service provider to cease practices in respect of the provision of media services if they infringe the provisions of the BA, a resolution of the KRRiT, or the terms of a broadcasting licence (Article 10(3)). This activity of the Chairman also does not have the form of an administrative decision or any other form regulated by the BA. In consequence, it is also not subject to appeal. Legal experts have suggested that such notification should be limited to the statement on improprieties in the activity of certain media provider.[27] In the case mentioned above, the Chairman may issue a decision ordering the media service provider to cease its practices (Article 10(4)). This decision does not have to be preceded by a requirement to provide materials, documentation, or information and by a call to cease practices that infringe the provisions of the BA. However, the Chairman makes these requirements in the majority of cases.[28] Should the broadcaster fail to comply with the obligations described above, the Chairman of the KRRiT is empowered (and also obligated) to adopt a decision imposing a fine (Article 53(1)). Any broadcaster may be the addressee of such a decision. The issue of culpability of the infringement is of no importance in the proceeding of adopting the above-mentioned decision. The procedure of imposing a fine on the basis of Article 53 BA is an administrative one.

Decisions imposing fines for infringement of the BA's provisions in Article 18 regulating the content of the programmes and other broadcasts are the subject of much controversy. The provisions of Article 18 contain vague terms that may be subject to different interpretations. These provisions have been criticized for creating too wide a basis for the KRRiT's intervention.[29] It is all the more important that the control of content carried out by the KRRiT should usually result in imposing penalties on broadcasters on the basis of Article 53 of the BA.

The way in which the tasks are carried out by the KRRiT has led to this body being described as a censor. It has been criticized for carrying out its functions in an excessive way, by commencing unnecessary proceedings against broadcasters. Such way of interpreting the provisions of the BA by the KRRiT creates uncertainty among broadcasters, and reinforces their belief in the need to moderate their mode of expression,[30] or to avoid some subjects which

27 Piątek, Dziomdziora, Wojciechowski, *Ustawa* (n 21) 101.
28 ibid, 102.
29 A Bodnar, 'Wstęp' A Bodnar and D Bychawska-Siniarska (eds), *KRRiT postrachem nadawców – wadliwe regulacje czy nadgorliwa instytucja? Matriały z konferencji* (Warszawa, Helsińska Fundacja Praw Człowieka, 2010) 6.
30 ibid, 5–6.

they consider to be controversial.[31] It is also emphasized that if the KRRiT is politicized, its control tasks can be carried out in such a way as to impose a specific concept of morality upon broadcasters.[32] Bearing this in mind, one may hypothesize that the manner of interpreting the provisions of the BA by the KRRiT can cause a so-called chilling effect by forcing some of the broadcasters to apply self-censorship.[33]

Another aspect—that of the KRRiT's officiousness—has been indicated by some commentators. It concerns issues of a formal nature—the proceedings before this body. These begin once the KRRiT receives a complaint from a viewer / listener. The problem is that each complaint, even if it comes from one person, results in that the KRRiT requests the broadcaster in question to provide explanations.[34] Furthermore, explanations are required by the KRRiT, and the broadcaster is obligated to provide them before the KRRiT, that decides whether the viewer or listener's complaint is justified. Broadcasters point out that by dealing with complaints in this way, the KRRiT compels them—or rather their lawyers—to invest time and money preparing the explanations, thus creating onerous conditions for them to provide their services.[35] What is more, the majority of the complaints are very general in nature, and they should not be pursued further, as they usually reflect the very radical opinions of the complainant while the opinions presented during the programme in fact remained within the scope of a democratic and pluralistic society.[36] This situation caused a quite radical reaction by some broadcasters who have considered the possibility of suing the KRRiT for violating their personal goods.[37]

C. Procedure before the Chairman of the Council—Administrative Procedure

The Chairman of the KRRiT as administrative body is obligated to proceed according to provisions of the Code of the Administrative Procedure (CAP).[38] It governs the proceedings before competent public administration authorities in individual matters to be determined by way of administrative decisions. This rule pertains also to other state authorities and other entities appointed to decide the above-mentioned matters (Article 1). All these authorities and entities have status of public administration authorities (Article 5(2)3).

The party to the administrative proceeding is every person whose legal interest or duty the proceedings concern, or who requests the authority's action due to his legal interest or duty (Article 28).[39] The status of the party may be enjoyed by natural and legal persons, and

31 E Wanat, 'Relacje Krajowej Rady Radiofonii i Telewizji z nadawcami: przypadek Radia TOK FM' Bodnar and Bychawska-Siniarska, *KRRiT postrachem nadawców* (n 29) 12.

32 Bodnar, 'Wstęp' (n 29) 6.

33 Wanat, 'Relacje' (n 31) 12.

34 Bodnar, 'Wstęp' (n 29) 6.

35 Wanat, 'Relacje' (n 31) 11.

36 R Chruściak, 'Krajowa Rada Radiofonii i Telewizji postrachem nadawców – wadliwa regulacja czy nadgorliwa instytucja?' Bodnar and Bychawska-Siniarska, *KRRiT postrachem nadawców* (n 29) 27.

37 Wanat, 'Relacje' (n 31) 13.

38 Ustawa z dnia 14 czerwca 1960 r. Kodeks postępowania administracyjnego, Dz.U. 1960, Nr 30, Poz. 168.

39 A Gronkiewicz, *Organizacja społeczna w postępowaniu administracyjnym* (Warszawa, LEX, 2012); ZR Kmiecik, *Wszczęcie ogólnego postępowania administracyjnego* (Warszawa, LEX, 2014).

with regard to state and self-government organizational units and social organizations, also entities not having the status of a legal person (Article 29).[40]

Legal capacity and the capacity to enter into legal transactions shall be determined according to the provisions of civil law, unless specific provisions provide otherwise (Article 30(1)). Natural persons with no capacity to enter into legal transactions should act in the administrative proceeding through their legal representatives (Article 30(2)). Parties not being natural persons in turn act in the administrative proceeding through their legal or statutory representatives (Article 30(3)).[41]

A party to the administrative proceeding may act through an attorney-in-fact, unless the nature of the action requires that it be taken by the party personally (Article 32).[42] The attorney-in-fact can be any natural person having capacity to enter into legal transactions (Article 33(1)). The power of attorney should be granted in writing in the form of an electronic document or submitted to the minutes (Article 33(2)).[43]

A public administration authority may apply to the court to designate a representative for an absent or incapacitated person, unless such a representative has already been appointed (Article 34(1)).[44] If an action is to be taken immediately, the public administration authority should appoint a representative for an absent person, who shall be authorized to act in the proceedings until an appropriate representative has been appointed by the court (Article 34(2)).[45]

Administrative proceedings in Poland can be initiated either upon the demand of a party, or *ex officio* (Article 61(1)).[46] Due to a particularly important interest of a party, a public administration authority may initiate the proceedings *ex officio* also in such matters where, according to the provision of law, an application of a party is required. The authority, however, is obligated to obtain consent of the party thereto in the course of the proceedings, otherwise the proceedings should be discontinued (Article 61(2)). All persons being parties to the proceedings should be notified that the proceedings have been initiated *ex officio* or upon an application of one of the parties (Article 61(4)). The authority can also refuse to initiate the proceeding if the demand has been submitted by a person who is not a party, or due to other justified reasons the proceedings cannot be initiated (Article 61a(1)).

The Code of the Administrative Procedure contains a whole set of rules on the time limits and their calculating. The key principle of calculating the time limits for the purposes of administrative proceeding is that if a time limit specified in days begins to toll upon a certain event, in calculating the time limit the day on which the event occurred should not be included. The end of the last day that is the prescribed number of days should be the end of the time limit (Article 57(1)). The time limit is be deemed to have been observed if before the end of the time limit the document has been: (1) sent in electronic form to the public administration authority and the sender received the official

40 E Klat-Górska and L Klat-Wertelecka, 'Oznaczenie strony w decyzji administracyjnej' *Samorząd Terytorialny* 7–8 (2004).

41 ZR Kmiecik, *Strona jako podmiot oświadczeń procesowych w postępowaniu administracyjnym* (Warszawa, Wolters Kluwer, 2008).

42 ZR Kmiecik, 'Zakres pełnomocnictwa w postępowaniu administracyjnym i sądowoadministracyjnym' *Przegląd Sądowy* 4–5 (2007).

43 A Matan, 'Zakres uprawnień pełnomocnika w ogólnym postępowaniu administracyjnym' *CASUS* 3 (2012).

44 H Knysiak-Molczyk, 'Prawo do skorzystania z pomocy i instytucji reprezentacji w postępowaniu administracyjnym' *Samorząd Terytorialny* 9 (2003).

45 B Majchrzak, '"Osoba nieobecna" w rozumieniu art. 34 k.p.a.' *Kwartalnik Prawa Publicznego* 4 (2003).

46 ZR Kmiecik, *Wszczęcie ogólnego postępowania administracyjnego* (Warszawa, LEX, 2014).

confirmation of receipt; (2) submitted to the Polish public operator's post office; (3) submitted to the Polish consular office; (4) submitted by a serviceman to the headquarters of a military unit; (5) submitted by a member of maritime vessel's crew to the captain of the vessel; (6) submitted by a person deprived of liberty to the administration of the penal institution (Article 57(5)).[47]

Article 58 of the CAP provides for the possibility of resetting a time limit. In case of a failure to observe a time limit, upon the request of the interested person, the time limit should be reset if the interested person shows reasonable reasons that the failure to observe the time limit was not attributable to the person's fault (Article 58(1)).[48] The request to reset a time limit should be submitted within seven days of the day the reason for failure to observe the time limit ceased to exist. The action for the performance of which the time limit has been appointed should be performed simultaneously with submitting the request (Article 58(2)). The public administration authority competent to dispose of the matter is competent to decide whether the time limit should be reset. The order on the refusal to reset the time limit shall be subject to complaint (Article 59(1)).

The Code of the Administrative Procedure provides for the general rules that should be obeyed by the administrative bodies during the administrative proceeding. According to the principle of legality public administration authorities are obligated to act on the basis of provisions of law (Article 6).[49] The principle of objective truth stated in Article 7 of the CAP means that in the course of the proceedings public administration authorities are obligated to protect legality and should undertake, *ex officio* or upon the application, any actions necessary to accurately clarify the facts of a matter, and to dispose of the matter, taking into account the public interest and just interest of citizens.

In order to fulfill the aforementioned principle, a public administration authority may summon persons to participate in the actions undertaken, and to give explanations and testimony personally, through an attorney-in-fact, in writing or in the form of electronic document, if it is necessary to decide the matter or perform official actions (Article 50(1)). The authority is obligated to ensure that compliance with the summons would not be burdensome (Article 50(2)). If the summoned person cannot appear due to illness, disability, or other obstacle impossible to overcome, the authority may perform the action or hear explanations or testimony of the person summoned in the person's place of residence if the circumstances surrounding the person allow (Article 50(3)).

The Code of the Administrative Procedure provides also for the summons in the specific form. Thus it states that in cases of the utmost urgency, a person may be summoned by telegraph or telephone or by any other means (Article 55(1)). Such summons, however, are legally effective only when there are no doubts that they reached the addressee in the appropriate contents and within the appropriate time frame (Article 55(2)).[50]

Pursuant to the provisions of the CAP, anything that may contribute to clarifying the matter and that is not in violation of the law may be admitted as evidence. In particular

47 M Szubiakowski, 'Obliczanie terminów' *Przegląd Podatkowy* 7 (2001).

48 Z Kmiecik, 'Brak winy w uchybieniu terminowi jako przesłanka przywrócenia terminu w postępowaniu administracyjnym' *Studia Iuridica Lublinensia* 11 (2008).

49 M Kopacz, 'Legalność działania organów administracji publicznej w postępowaniu administracyjnym a kontrola tej legalności sprawowana przez sądy administracyjne' *Zeszyty Naukowe Sądownictwa Administracyjnego* 2 (2014).

50 G Łaszczyca and A Matan, *Doręczenie w postępowaniu administracyjnym ogólnym i podatkowym* (Kraków, Zakamycze, 1998).

documents, witness testimony, expert opinions, and inspections may constitute evidence (Article 75(1)) Article 77 of the CAP provides for the very important principle of every administrative proceeding relating to collecting and evaluating evidence. Pursuant to thereof, a public administration authority has an obligation to completely collect and evaluate all evidence (Article 77(1)).[51] Facts publicly known and facts known to the authority *ex officio* require no proof. Facts known to the authority *ex officio* should be communicated to the party (Article 77(4)).

Also the party to the administrative proceeding has a right to submit evidentiary motions. A demand of a party concerning admission of evidence should be allowed if the object of the evidence is material to the matter (Article 78(1)).[52] However, a public administration authority may refuse to allow the demand which has not been submitted in the course of evidentiary proceedings or during the hearing if the demand concerns circumstances already proven by other evidence, unless such circumstances are material to the matter (Article 78(2)).

Each party should be notified at least seven days in advance as to the venue and date of evidentiary proceedings involving examination of witnesses, experts or inspection (Article 79(1)). Moreover, a party has the right to participate in evidentiary proceedings, may ask questions to the witnesses, experts, and parties, and may submit explanations (Article 79(2)). A public administration authority evaluates on the basis of all evidence collected whether a given circumstance has been proven (Article 80).[53]

Pursuant to the principle of deepening trust, public administration authorities conduct proceedings in such a manner as to deepen the trust of its participants to the public authorities (Article 8).[54] Public administration authority has also the obligation to obey the principle of furnishing information which means that is should duly and fully inform the parties on factual and legal aspects which may influence the establishment of the parties' rights and duties being the object of the proceedings. The authorities shall safeguard the parties and other persons participating in the proceedings, so that neither the parties nor the persons suffer any damage due to their ignorance of law and, to this end, the authorities shall furnish the parties and persons with necessary explanations and guidelines (Article 9).[55] This rule is reflected in the right of every party to the administrative proceeding to access to the case files, and to make notes and copies (Article 73(1)).[56] This rule however does not apply to case files protected as classified secret information with clause 'confidential' or 'strictly confidential' and to other files which the public administration authority excluded due to important state interest (Article 74(1)).[57]

51 ZR Kmiecik, 'Inicjatywa dowodowa w postępowaniu administracyjnym' *Prokuratura i Prawo* 6 (2008).

52 ZR Kmiecik, 'Proceduralny stosunek administracyjnoprawny w ogólnym postępowaniu administracyjnym' *Studia Iuridica Lublinensia* 22 (2014).

53 A Ziółkowska, 'Formy wadliwości postępowania wyjaśniającego w ogólnym postępowaniu administracyjnym' *Studia Terytorialne* 9 (2009).

54 P Wajda, 'Zasada ogólna pogłębiania zaufania obywateli do organów Państwa jako mechanizm zabezpieczający efektywność obrotu gospodarczego' *Przegląd Ustawodawstwa Gospodarczego* 9 (2010).

55 W Taras, 'Prawny obowiązek informowania obywateli przez organy administracji państwowej' *Państwo i Prawo* 1 (1988).

56 H Knysiak-Molczyk, 'Prawo do informacji w postępowaniu administracyjnym, sądowo-administracyjnym oraz ustawie o dostępie do informacji publicznej' *Przegląd Prawa Publicznego* 3 (2010).

57 J Chlebny, 'Udostępnianie stronie akt sprawy administracyjnej a prawo do sądu' *Zeszyty Naukowe Sądownictwa Administracyjnego* 3 (2008).

The principle of hearing of the parties means that public administration authorities are obligated to ensure that the parties may actively participate in every stage of the proceedings. Furthermore, prior to issuing a decision, the authorities the parties should be given an opportunity to present their position as to the collected evidence and materials, and submitted demands. The legislator, however, provided for the possibility of departing from the principle of hearing of the parties in cases where the matter must be decided without delay due to a threat to human life or health or due to threatening irreparable material damage. The reasons from departing from the aforementioned principle should be recorded in the case files by way of annotation (Article 10).[58]

Another principle of an administrative proceeding is the principle of explaining the grounds. It means that public administration authorities are under the obligation of explaining to the parties the grounds for deciding the matter in order to, if possible, enable the parties to satisfy the decision without the application of any coercive measures (Article 11).[59]

Article 12 of the CAP states the principle of prompt and simple proceedings. In consequence, public administration authorities should act in a detailed and prompt manner, applying the simplest possible measures to dispose of the matter. Matters in which it is not necessary to collect evidence, information and explanations, should be disposed of immediately.[60] The principle of prompt and simple proceedings finds its reflection in other provisions of the CAP. It contains rules that pertain to the timeframe of disposing the matters stating that it should be done without unnecessary delay (Article 35(1)). Furthermore, all matters which may be disposed of on the basis of evidence presented by a party together with the demand to initiate proceedings or on the basis of facts and evidence publicly known *ex officio* to the authority before which the proceedings have been pending or which may be established on the basis of data kept by the authority, should be decided immediately (Article 35(2)).

However, if it is necessary to conduct explanatory proceedings in the matter, the matter shall be decided no later than within one month, and if the matter is especially complex, no later than within two months of the day the proceedings have been initiated, and in the appellate proceedings, within one month of the day the appeal has been received (Article 35(3)). However, specific provisions may specify other time limits than those specified above (Article 35(2)). Whenever the public administration authority fails to dispose of a matter within the time limit specified in the CAP, it is obligated to notify the parties thereof, indicating reasons for the delay, and appointing a new time limit to dispose of the matter (Article 36(1)). The same duty shall also be imposed upon the public administration authority if the delay in disposing the matter has been caused by reasons not attributable to the authority (Article 36(2)).[61]

If the matter has not been disposed of within the time limit specified in the CAP or in the case of excessive lengthiness of proceedings, a party may file a complaint to the public administration authority of higher level, and if there is no such authority, the party may file summon to remedy breaches of the law (Article 37(1)). If the aforementioned authority

58 P Daniel and J Wilczyński, 'Naruszenie zasady czynnego udziału strony w postępowaniu administracyjnym, jako przesłanka uchylenia aktu przez sąd administracyjny' *Administracja: teoria, dydaktyka, praktyka* 3 (2014).

59 H Knysiak-Molczyk, *Uprawnienia strony w postępowaniu administracyjnym* (Kraków, Zakamycze, 2004).

60 W Bochenek, 'Bezczynność a milczenie organu administracji publicznej' *Samorząd Terytorialny* 12 (2003).

61 J Tarno, 'Bezczynność organu a przewlekłe prowadzenie postępowania' *CASUS* 3 (2013).

considers the complaint as well grounded, it should set an additional time limit for disposing of the matter, and shall order that the reasons for the delay be clarified and persons responsible for the failure to dispose the matter within the time limits be determined and, if necessary, that the measures to prevent the time limits for disposing the matter from being exceeded in the future be adopted. At the same time, the authority declares if the matter has not been disposed of within the time limit with grossly infringement on the law (Article 37(2)).[62]

The principle of simple and prompt proceeding is also reflected in the provisions relating to a hearing. Pursuant to Article 89(1) of the CAP in the course of the proceedings, a public administration authority should, *ex officio* or upon the application, hold a hearing whenever such hearing accelerates or facilitates the proceedings, or whenever a provision of law so requires. Holding a hearing is, however, obligatory whenever the need to reconcile the interests of the parties arises, or whenever such a hearing is required to clarify a matter with the participation of witnesses or experts or by means of inspection (Article 89(2)).[63]

The hearing should be presided over by a designated employee of the public administration authority before which the proceedings have been pending. If the proceedings have been pending before a collective authority, the hearing shall be presided over by the chairman or designated member of the collective authority (Article 93). At the hearing, the parties may submit explanations, demands, proposals, objections, and evidence in support. Moreover, the parties may present their opinion as to the outcome of the evidentiary proceedings (Article 95(1)). A person presiding over the hearing may revoke questions asked to witnesses, experts, and parties if such questions are not material to the matter. However, upon demand of a party, the essence of the question should be included in the minutes (Article 95(2)).[64]

Pursuant to the principle of amicable resolution of matters, if parties of opposing interests participate in the matter, the matter may be disposed of by way of a settlement drawn up before a public administration authority (administrative settlement). Public administration authorities before which the proceedings in the matter have been pending, should in such cases undertake actions to persuade the parties to settle the matter (Article 13).[65] The principle of amicable resolution of matters is reflected in the provisions that relate to settlement. Pursuant to Article 114 of the CAP, in a matter in which the proceedings have been pending before a public administration authority, the parties may reach a settlement if the nature of the matter allows therefore, if it contributes to the acceleration or facilitation of the proceedings, and if it does not violate any provision of law. The settlement may be concluded before the public administration authority before which the proceedings in the first instance or appellate proceedings have been pending, until the authority issues a decision in the matter (Article 115).

The settlement should be drawn up in writing. It should include the indication of the authority before which it has been made, the date of the settlement, the identification of the parties, the object and the contents of the settlement, an annotation confirming that the settlement has been read out and accepted, the signatures of the parties, and the signature of the public administration authority's

62 M Miłosz, *Bezczynność organu administracji publicznej w postępowaniu administracyjnym* (Warszawa, LEX 2011).
63 G Łaszczyca, *Rozprawa administracyjna w ogólnym postępowaniu administracyjnym* (Warszawa, Oficyna 2008).
64 ZR Kmiecik, *Strona jako podmiot oświadczeń procesowych w postępowaniu administracyjnym* (Warszawa, Oficyna, 2008).
65 B Gierczak, 'Ugoda administracyjna' *CASUS* 2 (2004).

employee authorized to draw up the settlement (Article 117(1)). The public administration authority is obligated to record the fact that the settlement has been made in the case files in the form of a protocol signed by a person authorized to draw up the settlement (Article 117(2)).

The settlement should be approved by the public administration authority before which it had been made (Article 118(1)). The public administration authority should refuse to approve the settlement if the settlement infringes on the law, ignores the position of other public administration authority, or infringes on the public interest or just interest of the parties (Article 118(3)).[66] The settlement is be enforceable as of the day the order approving the settlement becomes final (Article 120(1)). The approved settlement shall have the same effect as the decision issued in the course of the administrative proceedings (Article 121).[67]

The Code of the Administrative Procedure states also the principle of written proceedings pursuant to which all matters shall be disposed of in writing or in the form of an electronic document to be served by means of electronic communication. Matters may be disposed of orally if it is in the interest of the parties, and no provision of law provides otherwise. The contents and key reasons for such verbal disposal shall be recorded in case files by way of minutes or annotation signed by the party (Article 14).

During the administrative proceeding, the documents are served by postal operator (Article 39). Service of documents can be effected by means of electronic communication if a party or other participant to the proceedings satisfied one of the following conditions: Submitted application in the form of electronic document via electronic registry box of the public administration authority; applied to the public administration authority for such service, and shall specify the authority its e-mail address; consented in the proceeding to having documents serviced effected by such means, and specified to the authority its e-mail address (Article 39 (1)).[68]

It is worth emphasizing that the documents in principle should be served on the party, however, if the party acts through its representative, on the representative (Article 40(1)). In a matter initiated upon an application filed by two or more parties, the documents should be served upon all of the parties, unless in the application the parties indicated one of them as authorized to receive service of documents (Article 40(3)). If a party residing abroad or having its registered office abroad has not appointed an attorney-in-fact residing in the country, such party is obligated to indicate an attorney for service in the country, unless service should be effected by means of electronic communication (Article 40(4)). In case of not designating an attorney for service, documents to this party should be stored in the case files with effect of service. The party should be instructed about it with the first service. The party should be also instructed about the possibility of submitting its answer on document initiating the proceedings and the possibility of submitting an explanation in writing, and also about who can be appointed as attorney-in-fact (Article 40(5)).

In its Article 15, the CAP states the principle of two-instance proceedings. It means that administrative proceedings should be two levels of instances.[69] Pursuant to the principle

66 ŁM Wyszomirski, 'Ugoda administracyjna i postanowienie o zatwierdzeniu / odmowie zatwierdzenia ugody' *Studia Prawnicze* 3–4 (2011).

67 J Wyporska-Frankiewicz, *Publicznoprawne formy działania administracji o charakterze dwustronnym* (Warszawa, Oficyna, 2009).

68 E Cisowska-Sakrajda, 'Doręczanie pism w postępowaniu administracyjnym ogólnym i podatkowym w obrocie zagranicznym' *Administracja: teoria, dydaktyka, praktyka* 3 (2010).

69 Z Kmieciak, *Odwołania w postępowaniu administracyjnym* (Warszawa, Oficyna, 2011).

of durability of an administrative decision, decisions which are not appealable in the administrative course of instance, or decisions which are not applicable to reconsider the matter should be final. Such decisions may be quashed, amended, declared invalid, or the proceedings may be reopened only in instances provided for in the CAP or separate statutes. Claims may be filed with an administrative court on grounds of violation of law, on terms and according to procedures specified in separate statutes (Article 16).[70] In principle, the public administration authority disposes the matter by issuing a decision (Article 104(1)). An administrative decision concludes a matter as to the merits in whole, or in part, or otherwise close the proceeding in certain instance (Article 104(2)).[71]

The Code of the Administrative Procedure also provides for the possibility of discontinuation of the proceedings. If for any reason the proceedings became groundless in whole or in part, the public administration authority shall issue a decision on the discontinuance of the proceedings accordingly in whole or in part (Article 105(1)). The public administration authority may discontinue the proceedings if a party upon whose application the proceedings have been initiated applies therefore, and none of the other parties object thereto, and it is not contrary to the public interest (Article 105(2)).[72]

A decision should include the following: the identification of the public administration authority; the date of issuance; the identification of a party or parties; the specification of legal basis; the ruling; the legal and factual substantiation; the instruction on whether and according to what procedure the decision may be appealed against; the signature with identification of name and surname and official position of the person authorized to adopt the decision, or a secure electronic signature verified with valid qualified certificate. The decision with regard to which an action may be brought to a common court or a claim may be filed to an administrative court should also include an instruction on the admissibility of filing the action or claim (Article 107(1)).[73] Specific provisions may also provide for additional components which the decision should include (Article 107(2)).

Factual substantiation of the decision should in particular include identification of facts which the authority considered to be proven; evidence on which the authority relied, and reasons why the authority refused to consider other evidence as credible, and refused to rely thereon; the legal substantiation shall in particular include the explanation of the legal basis of the decision with citation of the provisions of law (Article 105(3)).[74] If the decision rules in favor of all of the demands of the party, the authority may choose not to substantiate the decision, however, it shall not apply to decisions resolving conflicting interests of the parties, and the decisions issued as the result of appeal (Article 105(4)). Also the authority may choose not to substantiate the decision if the possibility of refraining from substantiating the decision or of limiting the substantiation due to the State security interest or public order resulted from statutory provisions (Article 105(5)).

70 T Dziuk, 'Klauzula ostateczności decyzji administracyjnej' *Państwo i Prawo* 6 (2014).

71 M Kamiński, 'Teoretyczne problemy podziału decyzji administracyjnych na deklaratoryjne i konstytutywne a zagadnienia ich skuteczności temporalnej' *Przegląd Prawa Publicznego* 5 2008.

72 ZR Kmiecik, 'Instancja i tryb postępowania administracyjnego a prawo strony do żądania jego umorzenia' *Samorząd Terytorialny* 5 (2008).

73 Z Czarnik, 'Gwarancyjna funkcja uzasadnienia decyzji administracyjnej' *Administracja: teoria, dydaktyka, praktyka* 2 (2013).

74 P Chałas, 'Zastosowanie zasad ogólnych postępowania administracyjnego w formułowaniu uzasadnienia faktycznego decyzji administracyjnej' *Przegląd Prawa Publicznego* 1 (2009).

Article 108 of the CAP provides for the grounds for immediate enforceability of administrative decision. Thus a decision which may be appealed against may be appended with an immediate enforceability clause if it is indispensable to protect human health or life, or to protect national assets from severe damage, or due to other public interest or especially important interest of a party. In the last case the public administration authority, by means of an order, may request that the party submitted appropriate security (Article 108(1)).[75]

The administrative decision should be delivered to the parties in writing, or by means of electronic communication (Article 109(1)). However, in the cases specified in the CAP, it may be announced to the parties orally (Article 109(2)).[76] The moment of serving or announcing the decision has very important legal consequences. The public administration authority which issued the decision is bound by the decision from the moment the decision has been served or announced, unless the CAP provides otherwise (Article 110).[77] A party within fourteen days of the day of service or announcement of the decision may demand that the decision be supplemented with regard to the ruling or the right to file an appeal, an action to a common court, or a claim to the administrative court, or that the instruction included in the decision concerning the above be rectified (Article 111(1)).[78]

It is also worth mentioning that in the course of the proceedings, the public administration authority issue orders (Article 123(1)). The orders may concern the particular issues which arose in the course of the proceedings, but they do not conclude the matter as to the merits, unless the provisions of the CAP provide otherwise (Article 123(2)).[79] A party may appeal against a decision issued in the first instance only to one instance (Article 127(1)). The public administration authority of higher level shall be competent to consider the appeal, unless the statute provides for another appellate authority (Article 127(2)).[80]

D. System of Judiciary

In principle, according to Polish law, administrative decisions may be appealed against to the administrative court on the grounds of violation of the law (Article 16(2) of the CAP). Decisions imposing penalties on the basis of Article 53 of the BA, however, may be appealed against to the RC (Article 56(1) of the BA). This constitutes a very important exception to the principle that administrative decisions are subject to review (control) executed by administrative courts. The Regional Court has the status of a common (civil) court, so that in case of appeal against its decision, the Chairman of the KRRiT proceeds according to the provisions of the CCP relating to counteracting monopolistic practices (Article 56(2) of the BA). It means that the appealing person cannot have recourse to remedies for the purpose of appealing against the said decision provided for in the CAP (Article 56(3) of the BA).

75 B Augustyńska, 'Kilka uwag o rygorze natychmiastowej wykonalności decyzji (na przykładzie Kodeksu postępowania administracyjnego i Ordynacji podatkowej)' *Administracja: teoria, dydaktyka, praktyka* 4 (2014).
76 E Frankiewicz, 'Wydanie a doręczenie decyzji administracyjnej' *Państwo i Prawo* 2 (2002).
77 M Pułło, 'Związanie organu administracji publicznej własną decyzją jako zasada ogólnego postępowania administracyjnego' *Gdańskie Studia Prawnicze* vol XXIV (2010).
78 A Korzeniowska-Polak, 'Uzupełnienie albo sprostowanie decyzji wydanej w postępowaniu administracyjnym ogólnym' *Samorząd Terytorialny* 11 (2014).
79 G Łaszczyca, *Postanowienie administracyjne w ogólnym postępowaniu administracyjnym* (Warszawa, LEX, 2012).
80 Kmieciak, *Odwołania* (n 69).

The principle of appealing the decisions of the Chairman to the RC does not only result in the change of the court. Its consequence is above all the different procedure of reviewing the said decisions and its legal outcome. Appeals against the decision of the Chairman should be lodged with the RC through the Chairman (Article 479(28)2 of the CCP). The appeal has the nature of a lawsuit, and as such, it should fulfil all the requirements listed in Article 479(28)3 of the CCP. There are two parties to the proceeding before the CC, viz, the plaintiff or media service provider, and the defendant—the Chairman of the KRRiT. Appeal must be lodged with the RC within one month of the date on which the Chairman delivered his/her decision (Article 479(28)2). This time limit is fixed, which means that failure to adhere to it renders the appeal invalid (Article 167). Also, it cannot be extended or shortened by the RC. However, the CCP provides for the possibility of applying for the reinstatement of the deadline to the RC (Articles 168 and 169).

It is important to note that the appeal proceeding before the RC in Warsaw commences the civil proceeding intended to settle the dispute between the media service provider, who is the addressee of an administrative decision, and the Chairman of the KRRiT, who issued the decision. The aforementioned proceeding is not aimed at the review of the legality of the Chairman's decision or the proceeding of issuing thereof. That aim in turn is typical of appeal proceedings before the administrative court which, pursuant to Article 184 of the Constitution, exercises control over the performance of public administration. The difference between the aims of proceedings before the RC and the administrative court have very important implications as regards the scope of the court's activity expected by the legislator. The scope of judicial reviews of administrative decisions exercised by administrative courts is limited to procedural issues. The aim of a review of a decision of the Chairman of the KRRiT, in contrast, is aimed at their substantive and procedural revision. Thus, the RC in Warsaw is empowered to (1) dismiss the appeal if there is no basis for affirming it; (2) reject the appeal on formal grounds; or (3) affirm the appeal. In the last case, the RC can uphold the decision of the Chairman, or overrule it altogether or in part. When a decision is overruled, the RC can alter the decision entirely or in part, and rule on its substantive parts (Articles 479(31)–(31)a of the CCP).

Appeals against the judgments of the RC in Warsaw may be filed to the CA in Warsaw. Finally, it is also possible to file a cassation complaint to the SC. The appeal may be submitted by a party to a proceeding in relation to the part which was passed to its disadvantage. Proceedings before the CA are based on the merits of the case, although the appeal limits its jurisdictional freedom. The CA examines the case, and is composed of three professional judges. The appeal can contain charges of formal nature or charges concerning the merits. Charges of formal nature mean that the court of lower instance failed to examine the merits of the case, or substantially breached the procedural provisions. Charges as to the merits of the case can concern erroneous interpretation or the inappropriate application of provisions. Appeal proceedings can be concluded in several ways. First, the appeal can be rejected on formal grounds or dismissed. Second, the appeal can be allowed and in such case the CA can reverse the judgment, or amend or sustain it.

A cassation complaint can be filed against the judgments of the CA that terminated the proceeding, the rulings of the CA on rejection of an action, as well as against discontinuance of the proceeding. The following are the grounds for a cassation complaint: (1) breach of the substantive law through its erroneous interpretation or incorrect application; (2) breach

of provisions of proceedings if such default could have a considerable effect on the outcome of the case. The grounds for a cassation complaint cannot be charges connected with the establishment of facts or the assessment of evidence. The Supreme Court examines cassation complaint by a court composed of three judges. The Supreme Court can reject the cassation complaint, dismiss the cassation complaint, or accept it.

E. Procedure before the Courts—Civil Procedure

As it has already been mentioned, decisions imposing penalties on the basis of Article 53 of the BA may be appealed against to the RC (Article 56(1) of the BA). This constitutes very important exception to the principle that administrative decisions are subject to review (control) executed by administrative courts (Article 16(2) of the CAP). The Regional Court has a status of common (civil) court that, in case of appeal against decision, the Chairman of the KRRiT proceeds according to the provisions of the CCP relating to counteracting monopolistic practices (Article 56(2) of the BA). Therefore such, so called, hybrid proceeding[81] is against one of the basic rules of civil proceeding that civil court is not competent to adjudicate a case in the administrative proceedings (Article 1 of the CCP).[82] In principle, the administrative nature of a case constitutes the prerequisite for inadmissibility of a recourse to the law and rejection of a civil law action or motion (Article 199(1)1).[83] It should be mentioned, however, that the civil court cannot reject action or motion even if the case is not civil one when the administrative court previously recognized its incompetence (Article 199(1)).

There are several principles that govern the civil proceeding in Poland. Some of these principles are characterized as fundamental due to the fact that they guide ideas or assumptions that relate to all aspects of the civil proceedings, and indicate the methods of achieving the goals of such proceedings. The principles that determine the very nature of civil proceedings are the substantive truth, parties' autonomy, adversarial proceedings, equality of parties, directness, and orally conducted proceedings.[84] There are also other principles, such as

- principle of determination of legal relationship by the court;
- principle of free appraisal of evidence;
- principle of formalism of procedure;
- principle of concentration of the material submitted in court proceedings;
- principle of judge's control of the proceedings;
- principle of direct examination of evidence by the judge;
- principle of oral proceedings;
- principle of unconstrained right to determine a legal relationship;
- principle of adversary procedure;

81 Z Czarnik, 'W sprawie charakteru prawnego tzw. postępowań hybrydowych' *Zeszyty Naukowe Sądownictwa Administracyjnego* 2 (2015).

82 W Dawidowicz, 'Postępowanie w sprawach administracyjnych a postępowanie przed sądem cywilnym' *Państwo i Prawo* 8 (1990).

83 M Bogusz, 'Granice przedmiotowe prawa do sądu w sprawach z zakresu administracji publicznej' *Gdańskie Studia Prawnicze* 1 (2005).

84 T Ereciński, 'Civil Procedure' S Frankowski, *Introduction* (n 5) 122.

– principle of justice;
– principle of equality of parties;
– principle of the formal truth.[85]

All of these principles are expressed either in the specific provisions of the CCP or can be derived either from various provisions governing certain procedural institutions or from rights and duties of the parties and participants to proceedings. They are of special importance in the interpretation of the provisions governing civil proceedings.[86]

The principle of appealing the decisions of Chairman of the KRRiT to the RC in Warsaw does not only result in the change of the court. Its consequence is above all the different procedure of reviewing the said decisions and its legal outcome. In principle, civil courts examine cases arising under civil law, family and guardianship law, labour and social security law, and other categories of suits referred to civil litigation by statute (Article 1).

The civil case mentioned in Article 1 of the CCP is examined and adjudicated during examination proceedings. The whole civil procedure in Poland is divided into civil process (trial) and non-contentious (non-trail) proceedings. 'Although both of these modes are employed to achieve the same objective, they are, depending on the nature of the case, to some extend governed by separate provisions.'[87] Civil process (trial) is the most commonly used mode of examining the civil cases, because the CCP generally delegates all civil matters for examination by trial. As it is explained in the legal literature, 'This is the basic mode because the general provisions governing this mode also apply, *mutatis mutandis*, to the other modes of proceedings governed by the Code.'[88] The prerequisite for the trial and its main characteristic is the existence of two opposing parties. By contrast, the number of parties in non-trail proceedings may vary depending on how many persons have an interest in the outcome of the proceedings.'[89] Also, the characteristic of the case should be taken into account when deciding whether it should be examined in trial or non-trail proceeding. As the representatives of jurisprudence emphasize, in the absence of an express regulations to the contrary, it is presumed that the trial is the appropriate procedure. This mode contains ordinary proceedings and specific types of proceedings. Ordinary proceedings are designed for the majority of civil cases for which a trial is allowed. Special proceedings in turn are of two basic kinds: simplified and summary.[90]

Non-contentious proceedings in turn relate to both proceedings regulated in the CCP and in other legal acts. The following are specific types of proceedings regulated in the CCP: matrimonial proceedings, labor law and social insurance proceedings, proceedings in cases involving relationship between parents and children, proceedings concerning infringement of possession, commercial proceedings, order for payment proceedings, proceedings by writ of payment, simplified proceedings, European proceedings in cross-border cases, electronic proceedings by writ of payment.

85 I Gil and E Marszałkowska-Krześ, *Code of civil procedure. Presentations* (Warszawa, Wolters Kluwer, 2011) 15.
86 Ereciński, 'Civil Procedure' (n 84) 122.
87 ibid, 119.
88 ibid.
89 ibid, 121.
90 ibid, 120.

The appeal against the decision of the Chairman should be lodged with the RC through the Chairman of the KRRiT (Article 479(28)2). The appeal has a nature of a lawsuit and as such it should fulfil all requirements listed in Article 479(28)3 of the CCP. There are two parties of the civil process: plaintiff and defendant. The CCP provides for the regulations pertaining to the capacity to be a party in the civil proceeding (legal capacity). It states that capacity to be a party in the civil proceeding is vested in the natural persons, legal persons, organizational units which have the legal capacity on the basis of separate provisions. Such capacity is also vested in voluntary organizations, employer and pension bodies, citizens of foreign countries, foreign legal persons and organizational units having no legal personality as well as stateless persons (Article 64).[91]

As regards the proceeding before the RC, there are two parties—plaintiff that is the media service provider, and defendant that is the Chairman of the KRRiT. They also have to possess the capacity to be a party in the civil proceeding. According to Article 8 of the Civil Code (CC),[92] every human being shall have legal capacity from the moment of birth. Legal persons shall be the State Treasury and those organizational entities upon which special provisions of law confer legal personality (Article 33 of the CC). Pursuant to Article 33 of the CC, provisions on legal persons shall accordingly apply to such organizational units not being legal persons which have been granted the legal capacity by virtue of statutory law.

The lack of legal capacity may result in very serious consequences. First of all, in case if the lack of capacity is of the primary nature, the court will reject the civil action on the basis of Article 199(1)3 of the CCP. The court should suspend the proceeding when the lack of capacity to be a party to the civil proceeding occurs in thereof course (Article 174(1)1 of the CCP).[93] Furthermore, if the party lost the capacity to be a party to the civil proceeding and there is no legal successor, the civil court should decide on discontinuance of the proceeding (Article 182(1)).

Another issue is capacity to act in court proceeding that differs from the legal capacity described above. The two capacities are connected due to the fact that anyone who has a capacity to act in court proceedings should in parallel possess legal capacity. However, it is possible that someone does not possess the capacity to act in court proceedings while possessing legal capacity at the same time. As the representatives of the legal doctrine emphasize it, capacity to act in court proceedings constitutes one of the procedural prerequisites for initiating and carrying on the proceedings.[94] Every party may be represented by a representative in civil proceedings. The representative may be an attorney or legal advisor, acting on the basis of power of attorney granted by a party, a co-participant in the dispute or a parent, spouse, sibling, or company's employee.[95]

One of the fundamental principles of Polish civil procedure is the parties' autonomy. As it is explained in the legal doctrine, this principle means that the parties can exercise discretion with respect to their rights during the proceedings and the use of such rights. This autonomy is, however, subject to certain limitations due to the fact that certain parties'

91 Gil and Marszałkowska-Krześ, *Code* (n 85) 18; P Kaczmarek, *Zdolność sądowa jako problem teorii prawa* (Kraków, Zakamycze, 2006).

92 Ustawa z dnia 23 kwietnia 1964 r. Kodeks Cywilny, Dz.U. 2016 poz. 380.

93 E Gniewek, 'Utrata zdolności sądowej przez osobę prawną w trakcie procesu' *Rejent* 5 (1998).

94 Gil and Marszałkowska-Krześ, *Code* (n 85) 19.

95 Ereciński, 'Civil Procedure' (n 84) 128–29.

actions undertaken during the proceeding are to some extent under judicial supervision. In other words, generally the court is bound by such actions. However, if the facts clearly indicate that the parties' actions are intended to circumvent the law or are either contrary to the law or the principle of social coexistence, the court is empowered to accept some of the actions undertaken by the parties.[96]

According to the principle of the equality of the parties, each party has an equal opportunity to undertake certain procedural actions.[97] The case can be decided on its merits only after the opposing party's response on the substance of the suit has been heard, or at least after it has been given an opportunity to express its opinion on the statement of the other party, and to resort to various defensive measures. Violating the principle of equality of the parties can deprive them of the opportunity to undertake some procedural actions, and result in the invalidity of the proceedings.[98]

Another very important issue that pertains to the civil procedure in Poland is judicial jurisdiction. The jurisdiction of civil courts depends on the subject matter of the case, the domicile of the parties, the defendant's residence or registered seat as well the functions expected to be performed by a court in a given case. There are three types of judicial jurisdiction: material, territorial, and functional. Provisions of the CCP concerning the territorial jurisdiction provides for the possibility of determining which of two equivalent courts is competent to examine a case. In other words, the provisions regulating the territorial jurisdiction are aimed at delimiting the competences of the courts of the same rank with regard to the territorial range of their jurisdiction.[99] Functional jurisdiction is connected with the division of procedural actions between the courts of different rank and instance.[100]

The appeal should be lodged with the RC in Warsaw within one month from the date of delivering the decision of the Chairman of the KRRiT (Article 479(28)2). This time limit is prefixed which means that the failure it renders the appeal invalid (Article 167). Also, it cannot be extended or shortened by the RC. However, the CCP provides for the possibility of applying for reinstatement of the deadline to the RC (Articles 168 and 169).[101]

It is important to note that the appeal proceeding before the RC in Warsaw commences the civil proceeding that is focused on settling the dispute between the media service provider who is addressee of an administrative decision and the Chairman who issued the decision. The appeal against the decision of the Chairman should comply with the requirements for every civil suit provided for in the CCP. There are two categories of components of the civil suit provided for in the provisions of the CCP—obligatory and facultative.[102]

The principle of the civil proceeding is that the RC, acting as a court of lower instance, is composed of a single judge adjudicating a matter (Article 47(1)). The CCP also provides for the possibility of multi-person composition of the court. Such composition can be mixed,

96 ibid, 123.

97 A Góra-Błaszczykowska, 'Zasada równości stron w aspekcie zmiany przepisów art. 5 i 212 k.p.c. i wynikających z nich obowiązków sądu w postępowaniu cywilnym (uwagi na tle orzecznictwa Sądu Najwyższego)' *Przegląd Sądowy* 10 (2005).

98 Ereciński, 'Civil Procedure' (n 84) 125.

99 Gil and Marszałkowska-Krześ, *Code* (n 85) 28.

100 ibid, 30.

101 M Podleś, 'Przywrócenie terminu w postępowaniu cywilnym' *Radca Prawny* 1 (2010).

102 Gil and Marszałkowska-Krześ, *Code* (n 85) 71.

that is, containing presiding professional judge and two lay judges (Article 47(2)). It can also be professional which means that the court is composed of three professional judges. The mixed composition, however, is not applied in the cases of proceedings concerning the appeal against the decisions of the Chairman of the KRRiT.

The provisions of the CCP provides for the institution of the exclusion of the judge.[103] There are two ways of excluding the judge in the civil proceeding. Article 48 of the CCP provides for *ex officio* exclusion of a judge in every case when one of the following reasons occurs: (1) a judge is a party or remains with one of the parties in such legal relation where an outcome of the case affects the rights or obligations of the judge; (2) judge's spouse, relatives, and persons related by affinity in direct line, lateral relatives to the fourth degree and persons related laterally by affinity to the second degree; (3) in the case of persons related to a judge by adoption, guardianship, or curatorship; (4) cases in which a judge acted or acts as an agent for litigation or legal advisor of one of the parties; (5) in the cases in which a judge participated in undertaking an appealed judicial decision; (6) in the cases concerning the validity with the legal act completed or recognized with his participation, or in cases in which the judge participated as a prosecutor; (7) a judge participated in undertaking a judicial decision that subsequently became subject of a petition to revive the proceedings. The reasons listed above constitute grounds for excluding a judge automatically by virtue of the provisions of the CCP. The CCP provides also the grounds for excluding the judge on her/his demand or on motion of a party to the proceeding. Such demand or motion can be raised in every case in which there are reasonable doubts as to the objectivity of a judge in a given case (Article 49).

Before mentioning the issue of gathering the evidence material the problem of substantive (objective) and formal truth should be analysed here. These two principles are known to the Polish legal system. The principle of formal truth means that the court's factual and legal findings should be fully consistent with the evidentiary material presented by the parties. The principle of substantive truth in turn means that the court's factual and legal findings should correspond to the fullest possible extent to reality. The principle of substantive truth dominated in the civil procedure since 1964. The amendments to the CCP lead to deletion it from thereof provisions. Thus currently the principle of formal truth governs civil procedure in Poland.[104]

Another principle governing the civil procedure is the principle of adversarial proceedings.[105] It means that collecting and presenting the evidentiary material is the obligation of the parties. In trial proceedings the plaintiff should indicate the facts and evidence supporting his/her claims or motions. In other words, each party has the burden of proving the facts supporting the claim. Specifically, the burden of proof rests with the party attempting to infer legal effects from a given fact.[106] In some instances, however, the principle of adversarial proceedings gives way to the inquisitorial principle. This occurs once the court supplements the evidence material presented by the parties, or when it conducts the evidence not indicated by the parties. The inquisitorial principle, however, should be invoked only in exceptional circumstances.[107]

103 K Amielańczyk, 'Niemo iudex in causa sua. Wyłączenie sędziego w polskim postępowaniu cywilnym' *Gdańskie Studia Prawnicze* 2 (2011).

104 Ereciński, 'Civil Procedure' (n 84) 123.

105 I Adrych-Brzezińska, *Ciężar dowodu w prawie i procesie cywilnym* (Warszawa, LEX, 2015).

106 Ereciński, 'Civil Procedure' (n 84) 133.

107 ibid, 124.

The principle of free evaluation of evidence applies only to the evidentiary phase of the civil proceeding.[108] It means that the judge's conviction as to the assessment of the evidentiary material is very important. The judge, however, is obligated to reveal and explain the reasoning that led her/him to accept a given statement as a truth or to reject a given piece of evidence as unreliable or irrelevant. Thus the judge is obligated to evaluate the reliability and persuasiveness of a given piece of evidence in conformity of her/his own conscience. Such an evaluation should always be based upon the thorough examination of all of the evidentiary material.[109]

The Regional Court is empowered to gather the evidence during the civil proceeding. The main rule concerning the evidence during the civil proceeding is that it should lead to the ascertainment of facts having significant importance for the case (Article 227).[110] As it is explained in the legal doctrine, '[t]he facts relevant to the resolution of the case constitute the object of proof.'[111] There are, however, facts that do not require evidence. These are notorious facts (Article 228(1)), officially known facts (Article 228(2)), admitted facts (Article 229),[112] facts recognized as acknowledged (Article 230),[113] and facts presumed by the court (Article 231).

The CCP does not contain the exhaustive catalogue of evidentiary means. There are, however, provisions concerning the rules on some types of evidentiary means. As it is observed in the legal doctrine, evidentiary material may also be obtained by other means. In such case the court may determine at its discretion the manner of obtaining proof taking into account its nature, and applying the relevant legal provisions on taking evidence.[114]

Documents provided by the parties possess a value of evidence during the civil proceeding. Furthermore, the CCP gives precedence to documents over witness testimony and statements of the parties. The CCP distinguishes between official and private documents. 'Official documents must be prepared in the prescribed form by an appropriate state body acting within the scope of its authority or by a self-governed cooperative some other civic organization acting within the scope of the tasks entrusted to them in a given field of public administration.'[115] The CCP contains a whole range of regulations pertaining to the status and legal force of documents as evidence in the civil proceeding. Worth mentioning here are the legal presumptions that pertain to documents. The first one is the presumption of authenticity, ie, formal external validity. It means that both private and official documents are authentic, viz, it comes from the person or the body who signed it (Articles 244 and 245). Second one is the presumption of conformity with the truth that is formal internal validity.[116] It concerns solely official documents and means that the content of such document is truthful (Article 244(1)).

108 A Mariański, 'Swobodna czy dowolna ocena dowodów - teoria a praktyka' *Przegląd Podatkowy* 8 (2008).
109 Ereciński, 'Civil Procedure' (n 84) 126.
110 W Kuberska, 'Prekluzja materiału procesowego jako sposób koncentracji procesu cywilnego' *Radca Prawny* 3 (2008).
111 Ereciński, 'Civil Procedure' (n 84) 133.
112 A Jakubecki, 'Kontradyktoryjność a poznanie prawdy w procesie cywilnym w świetle zmian kodeksu postępowania cywilnego' *Przegląd Sądowy* 10 (1998).
113 A Łazarska, 'O prawdzie jako granicy wolności rozporządzania przez strony faktami w procesie cywilnym' *Przegląd Sądowy* 4 (2008).
114 Ereciński, 'Civil Procedure' (n 84) 133.
115 ibid, 133.
116 Gil and Marszałkowska-Krześ, *Code* (n 85) 56.

The CCP also contains regulations pertaining to the testimonial evidence. Such evidence is equal to other evidential measures listed in the CCP. The representatives of the legal doctrine emphasize, however, that the nature of such measures is subjectivism which leads to the conclusion that testimonial evidence is less certain than the material evidence for instance document.[117]

Another mean of evidence is hearing the party to the proceeding. Although the parties have the best knowledge of the facts of the case, their stake in the outcome of the proceedings often influences the way in which their knowledge is transmitted. From obvious reasons, this evidence is less reliable than other evidence in the civil proceeding. In some cases, however, such evidence is obligatory, mainly if the party demands such evidence. Normally such evidence is ancillary which means that it may be given in the proceeding if the court so decided in cases when other evidences cannot be relied upon (Article 299). Therefore, the parties' statements are introduced only in the final stage of evidentiary proceedings.[118]

Expert opinions are needed because they can impart special knowledge required to adjudicate the case.[119] The court determines whether such knowledge is necessary for it to make a judgment. The opinion of an expert is not binding for the court, and it should be evaluated as any other means of evidence. An expert may be an *ad hoc* expert or a standing court expert as well as scientific or research institute. It is important to note that the court decides who should issue the opinion. In case when the party hires an expert and provides the court with her/his opinion, the court evaluates it as a private document.[120]

There are several categories of time limits that are applied in the civil proceeding.[121] Judicial time limits are determined by the court (Article 164). Contractual time limits are determined by the parties to the proceedings. Statutory time limits are determined in the statute, mainly in the CCP. Instructional time limits means that non-compliance with them does not lead to negative procedural consequences. The consequences of non-compliance with the time limit are very serious. Thus, such failure may result in ineffectiveness of an act in proceeding, rejection of the remedies at law, return of a pleading, obligation to refund the costs. The CCP provides for the regulations that constitute conditions of the restitution of time limits. Firstly, it is necessary to fill a motion for restitution of a time limit within 7 days from the day of cessation of the cause of default (Article 169(1)). Secondly, the aforementioned motion should contain indication of circumstances justifying the motion (Article 169(2)). Thirdly, the failure to comply with the time limit should not be culpable by the party applying for thereof restitution (Article 168(1)). Fourthly, simultaneously with the said motion, the party should execute the required action (Article 169(3)).[122] Fifthly, the failure to comply with the time limit should result in the negative procedural consequences for the party (Article 168(2)).

The proceeding before the RC is not aimed at the review of the legality of the Chairman's decision and the proceeding of issuing thereof. That aim in turn is typical for the appeal proceeding before the administrative court that pursuant to Article 184 of the Constitution

117 ibid, 60.

118 Ereciński, 'Civil Procedure' (n 84) 136.

119 J Misztal-Konecka, 'Proces cywilny a opinia biegłego wydana w innym postępowaniu' *Przegląd Sądowy* 11 (2012).

120 Ereciński, 'Civil Procedure' (n 84) 135.

121 Gil and Marszałkowska-Krześ, *Code* (n 85) 66.

122 T Zembrzuski, 'Braki formalne czynności procesowej dokonanej wraz z wnioskiem o przywrócenie terminu' *Radca Prawny* 4 (2010).

exercise the control over the performance of public administration. The difference between the aim of a proceeding before the RC and the administrative court has very important outcome as regards the scope of the court's activity expected by the legislator. The scope of judicial review of administrative decisions exercised by administrative courts is limited to the procedural issues. The aim of the review of decisions of Chairman of the KRRiT in turn is aimed at their substantive and procedural revision. Thus, the RC is empowered to (1) dismiss the appeal if there is no basis for affirming it; (2) reject the appeal on formal grounds; (3) affirm the appeal. In the last case, the RC can uphold the decision of the Chairman, or overrule it altogether or in part. When the decision is overruled, the RC can alter the decision entirely or in part, and rule to it its substantive matters (Articles 479(31)–(31)a).

It is worth mentioning that there are two categories of judicial decisions that may be issued by the court in the civil proceeding—substantial and formal ones.[123] Substantial judicial decisions are decisions that determine the essence of the case. This category contains judgments and orders for payment. Formal judicial decisions that may be issued in the civil proceeding are rulings and dispositions.[124] The court issues ruling in order to close the proceeding or in the interlocutory matters (Articles 355 and 366). Dispositions may be issued by the presiding judge or by the court.

Every judgment is composed of two main parts: sentencing and reasoning. The part described as sentencing contains the initial part called comparison and the decision on the merits of the case (Article 325). The second part of the judgment described as reasoning contains reasons for the judgment. It should refer to both factual reasons and legal reasons (Article 328(2)).[125] The judgments issued in the civil process may be divided taking into account the category of the reasons of the judgment, ie, into dismissing judgments and allowing in full judgments. Another criterion of dividing judgments in the civil proceeding is the method of forming the substantive legal relation, that is, constitutive judgments and declaratory judgments.

Issuing a judgment in the civil proceeding leads to the following legal consequences: legal validity, effectiveness, enforceability.[126] The validity of judgments issued in the civil proceeding may be of formal and material nature. Formal validity means that suability of judicial decision is entirely excluded, remedy at law was instituted after required time limit, or the remedy at law was not instituted at all. Material legal validity of courts judgments means that they enjoy the *res iudicata* status. It also means that the parties to the proceeding, the court, and other subjects are bound by valid judgment. Enforceability of the judicial decisions means that they are subject to execution *ex officio* (by virtue of law), or by virtue of the court's judicial decision.[127]

The CCP provides for the possibility of instituting the remedies at law. These regulation of the CCP are aimed at following the constitutional rule envisaged in Article 176(1) of the Constitution of Poland that court proceedings should have at least two stages. As it is indicated in the legal doctrine, instituting the remedies at law is aimed at eliminating the

123 Gil and Marszałkowska-Krześ, *Code* (n 85) 77.
124 ibid, 78.
125 S Dąbrowski, 'Uzasadnianie orzeczeń sądowych w procesie cywilnym' *Przegląd Sądowy* 3 (2012).
126 Gil and Marszałkowska-Krześ, *Code* (n 85) 82.
127 ibid, 83.

errors. It concerns errors connected with the proceedings (*errores in procedendo*) and errors connected with judicial decisions (*errores in iudicando*). The latter category of errors can be connected with determining the facts (*errores facti*) and errors in applying the law (*errores iuris*).[128] *Errores in procedendo* contains formal charges, that is, charges concerning failure to examine the case's merits and substantial breach of the procedural regulations. The latter includes erroneous assessment of evidence and inconsistency of essential establishments of the court with the content of collected evidence.[129]

The system of remedies at law in the CCP is composed of the two categories of means of verifying the judicial decisions. The first category of remedies at law contains means of appeal against judgments and it comprises both ordinary and extraordinary means of appeal. The second category of remedies at law contains other remedies at law. As it has already been mentioned, there are ordinary and extraordinary means of appeal against judgments in the civil proceeding. Ordinary means of appeal can be instituted against the invalid judicial decisions, and contain appeal as well as complain. Extraordinary means in turn contain appeal in cassation, plea of illegality of a non-appealable ruling as well as petition for resumption of proceedings.[130] They can be instituted against the legally valid judicial decisions and they are of exceptional character.[131]

The remedies at law that are heard by the court of the higher instance are described as devolutive while non-devolutive remedies at law are heard by the same court that passed the judgment. The remedies at law may also be suspensory and non-suspensory. Suspensory remedies at law suspend the enforceability of the judgment. Lodging the non-suspensory remedy at law does not lead to suspending the legal validity of the judgment.[132]

The CCP provide for the prerequisites of admissibility of remedies at law. Firstly, the remedy should pertain to the existing judicial decision. Secondly, there should exist the entitlement for remedy at law against a specific judicial decision. Thirdly, the given remedy should be admissible pursuant to the law. Fourthly, the time limit for instituting the remedy at law should be observed. Fifthly, the remedy at law should be provided for in the form perceived in the provisions of law. Sixthly, a fee required by law should be paid.[133]

Appeals against judgments of the RC may be filed to the CA.[134] The appeal may be submitted by a party to a proceeding in relation to this part which was passed to its disadvantage. The proceeding before the CA is based on the merits of the case, however, the appeal limits its jurisdictional freedom. The CA examines the case in the judicial composition of three professional judges (Article 367(3)). One of the three judges who compose the court in a particular case carries the function of the president. The appeal can contain charges of formal nature or charges concerning the merits. Charges of formal nature mean that the court of lower instance failed to examine merits of the case or substantially breached the procedural provisions. Charges as to the merits of the case can concern erroneous interpretation or inappropriate application of

128 ibid, 96.
129 ibid, 114.
130 ibid, 98.
131 ibid, 100.
132 ibid, 101.
133 ibid, 102.
134 W Broniewicz, 'Dopuszczalność środków odwoławczych w postępowaniu cywilnym ze względu na przedmiot zaskarżenia' *Państwo i Prawo* 5 (1997).

provisions. The appeal proceeding is based on the merits of the case. As it is observed in the legal doctrine, the jurisdictional freedom of the court of higher instance is limited by the appeal itself, emergence of new facts and evidence, rule—*reformationis in peius*.[135]

The CA can analyse new facts and evidence in the appeal proceeding. Such facts and evidence can be reported to the CA solely in cases where previously they were unknown to the party. Moreover, they had to exist at the time of passing the appealed judgment but emerged at a later date. Submission of such facts and evidence with the appeal has to be justified. The aforementioned facts and evidence cannot be reported to the CA if the party failed to report them in the proceeding before the RC. It should also be established that the need of submission of new facts and evidence has arisen subsequently.[136]

The appeal proceeding starts with examining the appeal by the RC. The stage is aimed at examination whether the appeal fulfils the formal requirements prescribed in the CCP. After such examination is completed, the RC hands it over to the CA. There are many possibilities of concluding the appeal proceeding. First, the appeal can be rejected on formal grounds or dismissed. Second, the appeal can be allowed, and in such case, the CA can reverse the judgment or amend it as well as sustain it. It is important to note that judgments issued by the CA have legal validity from the time of its announcement, unless the judgment was revoked and the case was remanded.[137]

A cassation complaint can be filed with the SC against judgments of the CA that terminate the proceeding, rulings of the CA on rejection of an action as well as against discontinuance of the proceeding.[138] A cassation complaint is a legal measure designed to bring about the uniformity of the decisions of the courts of general jurisdiction.[139] Grounds for cassation complaint are (1) breach of the substantive law through its erroneous interpretation or incorrect application; (2) breach of provisions of proceedings if such default could have a considerable effect on the outcome of the case. The grounds for the cassation complaint cannot be charges connected with the establishment of facts or assessment of evidence. A cassation complaint may be submitted by the Attorney-General, a party, the Ombudsman, and the Ombudsman for the Rights of Children. The cassation complaint has to fulfill the following requirements: (1) designation of an appealed judicial decision with the indication whether the judicial decision is appealed as a whole or partially; (2) indication of the grounds for a cassation complaint and giving the reasons; (3) designation of a legal issue or the substantial doubts; (4) motion for acceptance of a cassation complaint for its examination and giving the reasons; (5) motion for revocation or revocation and alteration of a judicial decision with the indication of the scope of required revocation or alteration; (6) a cassation complaint should meet the requirements of a pleading and in pecuniary cases; (7) a cassation complaints should also include indication of the value of thereof subject; (8) a cassation complaint should be accompanied by two duplicates, one for the SC and the other for the Attorney-General.[140]

135 Gil and Marszałkowska-Krześ, *Code* (n 85) 108.
136 ibid, 113.
137 ibid, 115.
138 J Gudowski, 'Kasacja w postępowaniu cywilnym po zmianach dokonanych ustawami z dnia 12 i 24 maja 2000' *Przegląd Sądowy* 2–3 (2001).
139 Ereciński, 'Civil Procedure' (n 84) 139.
140 Gil and Marszałkowska-Krześ, *Code* (n 85) 122.

Different rule apply as regards the composition of the SC applies. In principle, the SC hears an appeal in cassation in three person composition (Article 398 (10)). While reviewing a cassation complaint, the SC does not try a case *de novo* but only reviews the challenged decision to determine whether the second-instance court judgment is contrary to law. For that reason, the SC is bound by the determination of facts made by the second-instance court.[141] The Supreme Court can reject the cassation complaint, dismiss the cassation complaint, or accept it.

VI. Freedom of Speech

Poland participates in the international structures connected with the protection of human rights. At the European level, it is worth mentioning that in 1991 Poland became a member of the Council of Europe, and in 1993, it ratified the European Convention on Human Rights (ECHR). Since 1993[142] Poland has been under the jurisdiction of the European Court of Human Rights (ECtHR) in Strasbourg. Poland also participates in the global system of human rights protection within the framework of the United Nations, and has ratified the ICCPR. To summarize the above, it should be emphasized that there are two sources of international law pertaining to the freedom of speech that have binding force in Poland. The first is the ECHR, and the second is the ICCPR. As a member state of the European Union, Poland is also obligated to apply the provisions of the EU law that pertain to human rights and freedoms.[143]

The importance of freedom of speech in Poland is highlighted in the Constitution.[144] It is worth emphasizing, however, that only in Article 213(1) is the notion 'freedom of speech' applied. In Article 14 of the Constitution, it is stated that Poland ensures the freedom of the press and other means of social communication. It should be noted that the above-mentioned rule is contained in Chapter I of Constitution entitled 'The Republic' which means that the freedom of the press and other means of social communication is a political rule. The freedom of speech is also subject to Article 54 of the Constitution. It constitutes three freedoms, viz, freedom to express opinions, freedom to acquire information, and freedom to disseminate information. The above-mentioned provisions of the Constitution should be taken into account when analysing the scope of freedom of speech that may be exercised by radio and television in Poland.

Without doubt, freedom of speech was assigned a special importance in Polish law. In spite of its importance, freedom of speech does not have an absolute nature. Although it is emphasized in Article 31(1) of the Constitution that the freedom of every person shall receive legal protection, the Constitution provides for the possibility of imposing limits on the exercise of some freedoms including the freedom of speech. Any limitation of this kind may be imposed only by statute, and only when it is necessary in a democratic state for the protection of its security or public order or to protect the natural environment, the public

141 Ereciński, 'Civil Procedure' (n 84) 139.

142 Oświadczenie rządowe z dnia 7 kwietnia 1993 r. w sprawie deklaracji o uznaniu kompetencji Europejskiej Komisji Praw Człowieka oraz jurysdykcji Europejskiego Trybunału Praw Człowieka, Dz.U. 1993, Nr 61, Poz. 286.

143 For more extensive review of such regulations, see, P Wiśniewski, 'Wpływ prawa Unii Europejskiej na tworzenie prawa mediów w Polsce. Zagadnienia wybrane' Lis and Husak, *Praktyczne aspekty* (n 22) 173–86.

144 For an extensive analysis of the constitutional provisions concerning the freedom of speech, see, W Lis and Z Husak, 'Konstytucyjne podstawy wolności wypowiedzi' Lis and Husak, *Praktyczne aspekty* (n 22) 103 and fn.

health, public morals, or the freedoms and rights of other persons. Such limitations, however, cannot violate the essence of freedoms and rights (Article 31(3)).

As the doctrine indicates, the freedom of speech may come into conflict with other freedoms. Therefore, it is of high importance to demarcate its limits in such a way that, on the one hand, the nature of freedom of speech is not infringed, and on the other hand, other freedoms are protected.[145] Every court making judgments in cases concerning the freedom of speech should bear in mind that every limitation thereof constitutes interference with one of the basic rules of a democratic state. Therefore, it is necessary to consider carefully the reasons for limiting the freedom of speech in a given case.[146]

Apart from the provisions stating that the KRRiT shall safeguard freedom of speech in radio and television broadcasting, the BA does not contain any further regulations concerning this freedom. It should be emphasized, however, that Article 3 of the BA refers to provisions of Polish law[147] that are applicable to the transmission of radio and television programme services unless it is otherwise provided. Polish law in turn states that the press, protected by the Constitution, exercises the freedom of speech (Article 1). The above-mentioned provisions of the BA and Polish law lead to the conclusion that the freedom of speech can be exercised not only by the press but also by radio and television.

The freedom of speech that can be exercised by radio and television does not have an absolute nature. Limitations on free speech can be introduced within a system of licensing and registration of radio and television, as well as bans on certain types of programmes as described above. Furthermore, the limits of the freedom of speech that can be exercised by radio and television are introduced by indicating standards that should be complied with by radio and television programmes. These standards concern the content of the programmes that is expected by the legislator. The general requirements relating to the content of radio and television programmes are provided for in Article 18 of the BA. There are also specific requirements pertaining to broadcasts which contain commercial communications in the content of on-demand audiovisual media services. All of these requirements are described above.

Those standards that should be fulfilled by radio and television programmes are aimed at the protection of a whole range of values. However, protection of these values very often results in the restriction of another very important value—the freedom of speech. Therefore application of Article 18 BA by the KRRiT and courts requires carefully balanced argumentation about the necessity of restricting one freedom in order to protect another freedom. The argumentation should be focused on weighing the 'importance' of every freedom, and reasoning why one freedom needs to be protected at the cost of restricting another one. The cases discussed in this part were selected with the intention of illustrating the process of balancing the above-mentioned values, and presenting the arguments underlying the judgments and administrative decisions.

The following parts of this research are based on an analysis of provisions that pertain to human dignity, hate speech, balanced coverage, and commercial communications. They are also based on the analysis of cases. Such a combination is of great importance when trying to formulate a model of freedom of speech in Poland. The legal literature outlines this as

145 J Szymanek, 'Konstytucyjna zasada wolności słowa w radiofonii i telewizji' *Państwo i Prawo* 8 (2007) 19.
146 ibid, 22.
147 Ustawa z dnia 26 stycznia 1984 r. Prawo prasowe, Dz.U. 1984, Nr 5, Poz. 24.

follows: The relevant laws determine this model in a general way, which is complemented by the interpretation and application of these laws by courts that make judgments in cases concerning the freedom of speech.[148]

When examining the viewpoints on the freedom of speech presented by broadcasters, an opinion expressed by Jacek Sobczak is worth quoting here. Although this opinion concerns the freedom of the press, it can also be applied to radio and television. He expressed the view that publishers, editors, and journalists are convinced that the press is allowed to do everything, and is not responsible for anything.[149] The analysis of cases described below and especially the arguments put forward by broadcasters suggests that this opinion is justified. In several cases analysed for the purposes of this project, the broadcaster argued that certain programmes did not exceed the limits of the freedom of speech due to their satirical nature. The common argument raised in such cases is that the authors of these programmes did not intend to insult or humiliate anybody or violate rights of other persons. Also the broadcasters unanimously emphasize that the idea of such controversial programmes was to initiate a public discussion on certain issues.

With regard to the decisions of the Chairman of the KRRiT adopted in the cases analysed below, it should be mentioned that they are focused on protecting several human rights such as human dignity, religious feelings or patriotic feelings. When justifying the decisions to imposing fines on broadcasters, the Chairman mostly invokes the provisions of Polish law. As regards international sources, only Article 10 of the ECHR is invoked in the decisions of the Chairman. It is clear that the situation of the KRRiT seems to be complicated by the variety of its tasks. On the one hand, the KRRiT is obligated to safeguard the freedom of speech in radio and television broadcasting, while on the other hand, the KRRiT is expected to supervise the activity of media service providers. The latter task also includes supervising whether media service providers obey Article 18 of the BA that is aimed at protecting a range of rights that constitute the limits of freedom of speech. Hence, the tasks of the KRRiT include both protecting the freedom of speech in parallel with protecting other human rights.

Here we will deal with the RC judgments made in the last ten years as a result of appeals against the decisions of the Chairman adopted on the basis of Article 53 of the BA. Due to the fact that appeals against judgments of the RC may be filed to the CA, judgments by this court in cases arising from a decision by the Chairman to impose a fine are also analysed here. Some judgments of the SC are also analysed, when they are passed as a result of a cassation complaint against the aforementioned judgment of the CA.

A detailed analysis of the judgments carried out below points to the conclusion that Polish courts judging cases concerning the freedom of speech focus above all on the provisions of Polish law, in particular the regulations provided for in the BA. They also refer in their judgments to international law, although they limit their reasoning to Article 10 of the ECHR. They hardly ever refer to the provisions of the ICCPR. It is interesting that this state of affairs has also been noticed in the Polish legal literature, with some commentators

148 W Lis, 'Wolność wypowiedzi działalności dziennikarskiej w perspektywie zjawiska mowy nienawiści (wybrane aspekty prawne)' W Lis (ed), *Status prawny dziennikarza* (Warszawa, LEX, 2014) pt 3.

149 J Sobczak, 'Fetysz wolności prasy' P Dudek and M Kuś (eds), *Prawne, ekonomiczne i polityczne aspekty funkcjonowania mediów i kreowania ich zawartości* (Toruń, Wydawnictwo Adam Marszałek, 2010) 43.

arguing that the provisions of the ECHR, which pertains to European states, are regarded as 'being closer' to Poland. Moreover, the observance of ECHR is guaranteed on a higher level than the observance of the ICCPR.[150] Additionally, courts judging cases concerning the freedom of speech and the limitations thereof do indeed refer to international sources, but only as regards the freedom of speech and the conditions that should be fulfilled in order to introduce any limitations on such freedom. They do not refer, however, to the aforementioned international sources when they analyse other freedoms that demarcate the limits of freedom of speech. Polish courts instead merely analyse national provisions when referring to such freedoms in their judgments. Some of the judgments analysed here refer to the judgments of the ECtHR. Only in cases concerning commercial communications do some of the courts invoke provisions of EU law as well as the judgments of the Court of Justice of the European Union. Surprisingly, the courts giving judgments in the cases analysed below, hardly ever contain in their reasoning arguments concerning the value of certain human rights, or weighing the 'importance' of every freedom, and reasoning why one freedom needs to be protected at the cost of another one. In the majority of cases, the courts merely restrict themselves to stating that the freedom of speech does not have an absolute nature, and its limits are imposed by other freedoms.

The majority of its judgments the RC shared the view of the Chairman of the KRRiT. Only in two cases did the RC express the opinion that the freedom of speech was not exceeded in the programme in question. The CA appears to be even more uniform as it did not give any judgments in which the arguments of the Chairman were not shared. This is also the case for the SC's judgments. This state of affairs suggests the conclusion that courts in Poland that issue judgments as a result of appeals against the decisions of the Chairman tend towards protecting human rights other than the freedom of speech, the limits of which they interpret in a very restrictive way. In particular courts give preference to human dignity and the need to protect personal rights.

In summary, broadcasters in Poland can exercise the freedom of speech as long as their activity does not provoke the opposition of the Chairman of the KRRiT. However, it should be admitted that the Chairman very often uses so-called soft instruments in borderline cases, and limits its activity to sending a broadcaster a notice of reservations about the content of a certain programme. There are also cases in which fines were not imposed on broadcasters, but the Chairman called upon them to cease their practices infringing the provisions of the BA. The above conclusion is of high importance in the light of predictions about the broadcaster's fate when the Chairman decides upon imposing a fine for infringing the provisions of the BA. The statistics show that in cases where such decisions were issued and the broadcaster decided to lodge an appeal against them, the broadcaster's defeat is more than likely. This situation demands an explanation. Are we to conclude that the Chairman adopts decisions imposing fines for infringing the provisions of the BA so prudently, and justifies them so sufficiently that the courts examining such cases have no choice but to share the arguments raised in such decisions, or is accepting the decisions simply more convenient for the courts?

150 LK Jaskuła, *Prawo do dobrego imienia a wolność pracy* (Warszawa, CH Beck, 2008) 37.

VII. Protection of Human Dignity

The Broadcasting Act prohibits any commercial communication prejudicial to the respect for human dignity (Article 16b(3)1). Apart from the provisions pertaining solely to commercial communications, the BA does not contain provisions directly regulating the protection of human dignity in a general way. The reason for this is probably that the special value of human dignity is emphasized in Article 30 of the Constitution. It states that the inherent and inalienable dignity of the person shall constitute a source of the freedoms and rights of persons and citizens. In consequence human dignity in Poland is perceived both as a value and a legal norm. Dignity as a value is placed above the legal order, as a legal norm in turn is the right of every person.[151] The protection of dignity is subject to another provision of the Constitution (Article 47) stating that everyone has the right to legal protection of her/his dignity.

Bearing in mind this special meaning of human dignity, it is not surprising that the BA does not contain provisions directly addressing human dignity. The Broadcasting Act does, however, contain regulations that are aimed at the protection of human dignity by safeguarding certain freedoms and rights of persons and citizens. Article 18(1) of the BA prohibits the transmission of programmes and other broadcasts that encourage actions contrary to the law and to Poland's reason of state or which propagate attitudes and beliefs contrary to moral values and the social interest. The notion of 'actions contrary to the law' means every legal provision, that is, as the legal literature explains, inclusive of the whole legal system of penal law, constitutional law, civil law, and administrative law.[152]

It should be taken into account that human dignity is related to the notion of personal goods, which are protected under the provisions of the CC.[153] It does not define personal goods but only gives the examples of health, freedom, dignity, freedom of conscience, inviolability of home, name or pseudonym, image, privacy of correspondence, and scientific artistic, inventive and improvement achievements. While Article 23 of the CC states that personal goods are subject to the protection of civil law, this protection is executed independently of the protection provided for by other regulations, eg, Article 18(1) of the BA. Article 24 of the CC provides for the means of protection of personal goods stating that any person whose personal goods are threatened by another person's actions may demand that the actions be ceased unless this would not be unlawful. In the case of infringement such a person can also demand that necessary actions be taken in order to reverse its effects, in particular that the person make a declaration of the appropriate form and substance. Furthermore, the CC provides for the possibility of demanding monetary recompense, or that an appropriate amount of money be paid to a specific public cause (Article 24(2)). If financial damage is caused as a result of the infringement of a personal good, the aggrieved party may demand its remedy (Article 24(3)).

151 M Granat, 'Godność człowieka z art. 30 Konstytucji RP jako wartość i jako norma prawna' *Państwo i Prawo* 8 (2014) 22.

152 J Sobczak, *Radiofonia i telewizja. Komentarz do ustawy* (Kraków, Zakamycze, 2001) 251.

153 For an extensive review, see, eg, K Święcicka, 'Ochrona dóbr osobistych a wolność krytki prasowej' Lis and Husak *Praktyczne aspekty* (n 22) 227–43.

Polish courts[154] and jurisprudence[155] acknowledge that religious feelings belong to the category of personal goods—they constitute a personal good of special value, and have special protection also on the basis of Article 18(2) of the BA stating that programmes and other broadcasts shall respect the religious beliefs of the public and especially the Christian system of values. This special protection of religious beliefs of Catholics is visible in the decisions of the Chairman of the KRRiT and national courts described below, however, some legal scholars are of the opinion that the KRRiT does not protect religious beliefs sufficiently, and thus encourages broadcasters to infringe Articles 18(1)–(2) of the BA.[156]

A. Case Studies Concerning Human Dignity

The analysed cases relate to a whole range of values, which is perhaps due to the general meaning of this notion in Poland. Hence, these cases concerned religious feelings, insulting a person because of skin colour, mimicking a disabled person, and ridiculing his/her public activity and insulting patriotic feelings. In the majority of these cases the courts gave judgments in favour of human dignity in its general meaning. There are two exceptions: First, the RC in its judgment on a case involving the insulting of religious feelings gave priority to the freedom of speech. The second exception is the judgment of the RC given in a case on insulting patriotic feelings. This judgment, however, is specific as the RC referred neither to the freedom of speech nor to human dignity. It merely stated that an insult can occur only if it is intentional and aimed at insulting someone, which was not the case in the programme in question.

In judgments concerning human dignity, the courts referred mainly to Article 10 of ECHR, although there are also judgments in which the courts referred solely to Polish law, and made no reference to international sources. Pertinent to this is the judgment of the RC in a case concerning religious feelings in which reference was made to the Declaration on the freedom of political debate in the media adopted by the Council of Europe.[157] Furthermore, in this judgment the RC expressed the opinion that the provisions of the BA should also be interpreted in the light of the judgments of the ECtHR.

Only two judgments concerning human dignity contain in their reasoning arguments on the value of human dignity in the form of patriotic feelings. In the case concerning the insulting of patriotic feelings by tarnishing the national flag, both the CA and SC analysed the value of national symbols in Poland and indicated why this value needs to be protected at the cost of the freedom of speech.

154 Judgment of 6 April 2004 of the Supreme Court, I CK 484/03, http://www.sn.pl/sprawy/SitePages/e-Sprawa.aspx?ItemID=488&ListName=ESprawa2003&Search="I per cent20CK per cent20484/03".

155 Eg, LK Jaskuła, 'Uczucia religijne jako granica wolności wypowiedzi (wybrane zagadnienia prawne)' Lis and Husak, *Praktyczne aspekty* (n 22) 359–80.

156 ibid, 375.

157 Declaration on Freedom of Political Debate in the Media Adopted by the Council of Europe, Committee of Ministers, February 2004, at the 872nd meeting of the Minister's Deputies.

i. Insulting Religious Feelings of Others

a. Case Description

Krzywe Zwierciadło is one of the most popular programmes transmitted by the TV station Superstacja—this satirical daily talk show, propagating liberal views, has been transmitted for five years. The format of the programme is that its host Kuba Wątły and his guests comment on recent political events by exaggerating or ridiculing them. They use strong and expressive stylistic means.The topic of the show transmitted on 22 February 2012 was the problem of paedophilia in the Catholic Church—participants criticized Catholic priests' tendency to paedophilia. After the broadcasting of the programme, 5 persons complained to the KRRiT.

b. Argumentation of the Chairman of the Council

In the decision of 21 January 2013,[158] the Chairman of the KRRiT argued that religious beliefs of the public were not respected in the show in issue. The Chairman indicated that the behaviour of the participants in the programme exceeded the permissible limits of satire. It contained statements that were insulting to Catholic priests in the context of the paedophile scandals. Also, the programme referred in an insulting manner to relics that are the subject of cults in Poland. In the opinion of the Chairman, *Krzywe Zwierciadło* had discriminatory content on the grounds of religion. Acceptable criticism of the Catholic Church does not mean the right to speech that is insulting and irreverent to the subjects of religious cults.

The Chairman emphasized that religious beliefs are subject to protection in Polish law due to the fact that they constitute personal goods. The decision imposing the fine on Superstacja contains reference to national legal provisions and court judgments as well as to Article 10 of the ECHR.

c. Argumentation of Superstacja

Superstacja emphasized the satirical nature of the programme in question, which aimed at reviling the negative sides of the activity of the Catholic Church. It argued that actually the programme promoted the attitude of opposition to wrongdoing because its aim was to ridicule occurrences that provoke public indignation. Superstacja admitted that the presenters of *Krzywe Zwierciadło* use means of expression that may not suit viewers of special sensitivity.

d. Judgment of 29 May 2014 of the Regional Court in Warsaw, XX GC 374/13[159]

In the extensive justification of its sentence, the RC referred to the provisions of Articles 14 and 54(1) of the Constitution. It also referred to Article 10 of the ECHR. It is interesting

158 Decision of 21 of January 2013 of the Chairman of the KRRiT, made available by the Chairman at my individual request.

159 http://orzeczenia.ms.gov.pl/search/simple/N/XX0020GC$0020374$002f13/$N/$N/1.

to note that the RC expressed the opinion that interpreting the provisions of the BA, the judgments of the ECtHR should be taken into account. According to the RC, Articles 18(1)–(2) the BA contains provisions limiting the freedom of speech that should be assessed in the light of Article 10(2) of the ECHR.

The Regional Court emphasized that freedom of speech exercised by journalists allows for exaggeration or provocation. It indicated that due to the fact that *Krzywe Zwierciadło* is a satirical show, it can have more exaggerated and provocative content than other programmes. The Regional Court based its opinion on the Declaration on freedom of political debate in the media adopted by the Council of Europe. According to the RC, even the title of the programme in question (False Mirror in English) indicates that it has distorted content. Furthermore, *Krzywe Zwierciadło* is known for its sceptical attitude to the Catholic Church. Therefore, its viewer should expect criticism of the institutions of the Catholic Church, religion, and morality. The Court decided that the freedom of speech was not exceeded during the programme in question, especially as it did not have content violating religious beliefs and the Christian system of values.

e. Comments

In response to the decision of the Chairman of the KRRiT, the Free Mind Foundation appealed to the Chairman for not imposing a fine on Superstacja. The Foundation expressed the opinion that the broad interpretation of religious beliefs applied by the KRRiT results in a form of censorship. During the programme in question, the TV presenters emphasized that the Catholic faith is not subject to their criticism. What they criticized was the attitude of the Catholic Church to the problem of paedophile priests.[160]

ii. Insulting a Person Because of Skin Colour

a. Case Description

Eska ROCK is a music radio station, one of its programmes was *Poranny WF*. It was transmitted every day from Monday to Friday between 8 and 10 am. The listeners of Eska ROCK are mainly young people under thirty. During the programme, its hosts Michał Figurski and Kuba Wojewódzki imitated certain persons, or arranged situations in which they passed themselves off as other persons. They also had conversations with each other.

On 25 May 2011, Wojewódzki and Figurski discussed on the air the forthcoming visit of Barack Obama. It became a point of departure for jokes on the black skin. Both presenters tried to call Alvin Gajadhur who is the press spokesman of the Inspectorate of Road Transport. They made the following comments when they dialled the number: 'Let's call the Negro'; 'National Register of Negros is the institution we have been working at for a long time'; 'Today's programme is sponsored by the Warsaw unit of Ku-Klux-Klan.'

160 Apel do KRRiT o niekaranie za kpiny z księży, 7 September 2012, http://www.racjonalista.pl/kk.php/s,8322/q,Apel.do.KRRiT.o.niekaranie.za.kpiny.z.ksiezy.

After the transmission of the programme in question Gajadhur complained against its content to the KRRiT, accusing both presenters of violating his personal goods and of racist speech.

b. Argumentation of the Chairman of the Council

In the decision of 13 October 2011,[161] the Chairman of the KRRiT expressed his opinion that the behaviour of Wojewódzki and Firgurski was aimed at humiliating Gajadhur in front of the public. Furthermore, by indicating Gajadhur as a person who has black colour of skin, and by telling jokes connected with this colour and his descent both presenters discriminated against him on the grounds of race. Such behaviour demonstrated to the listeners of the said programme, insulting other people only because of skin colour is socially acceptable.

The Chairman referred to the limits of satire indicated in the judgments of ECtHR, the national court, and in the views in the legal literature. In the opinion of the Chairman, the content of programmes is not permitted to violate personal goods in the meaning of the CC. Also, such content is not allowed to constitute the crime of assault in the meaning of the Penal Code.[162] The decision emphasizes that assessing whether the human dignity of a certain person (as in the case in question) was violated, it is necessary to analyse how the speech (content) was received by its target. The Chairman quoted the judgment of the CA in Warsaw, in which it stated that personal dignity also means the expectation of respect from other persons.[163] Based on these, the Chairman decided that Wojewódzki and Figurski did not show respect for Gajadhur due to the fact that their speech was limited to insulting jokes about his skin colour.

c. Argumentation of Radio Eska ROCK

Radio Eska ROCK argued that the programme in question was satirical in nature and its authors intended to expose and criticize the xenophobic attitudes of Polish society. This intention was wrongly interpreted by Gajadhur, nevertheless, Eska ROCK apologized to him for the content of the programme in question. Furthermore, supervisors had a talk with Wojewódzki and Figurski in order to sensitize them to the regulations of the BA.

d. Judgment of 3 October 2012 of the Regional Court in Warsaw, XXVI GC 571/12[164]

The Regional Court shared the view of the Chairman of the KRRiT. In its opinion, the content of the programme *Poranny WF* created favourable conditions for strengthening xenophobic and racist attitudes. The Court emphasized that the personal goods of other people (human dignity) constitute a limit on the freedom of speech.

161 Decision No 15/2011 (13 October 2011) of the Chairman of the KRRiT, http://www.krrit.gov.pl/Data/Files/_public/Portals/0/komunikaty/kp2011/listy_zalaczniki/decyzja_kara_eskarock-poranny-wf.pdf.

162 Ustawa z dnia 6 czerwca 1997 r. – Kodeks karny, Dz.U. 1997, No 88, Poz. 553.

163 Wyrok Sądu Apelacyjnego w Warszawie, 13 April 2011, VI ACa 1310/10.

164 The judgment was made available by the RC in Warsaw at my request.

e. Judgment of 30 August 2013 of the Appeal Court in Warsaw, I ACa 94/13[165]

The CA did not share Radio Eska's view. It expressed the opinion that even though presenters of *Poranny WF* did not incite to racial hatred, the programme had discriminating content on the grounds of race. The statements of both presenters as well as their mocking and ironic style show that the programme was aimed at stigmatizing and discriminating against persons of black colour of skin. They could be received by listeners of black skin as humiliating and excluding. Thus, in the opinion of the CA, the comments made by Figurski and Wojewódzki violated the human dignity of persons of black colour of skin.

According to the CA the programme in question was not of a satirical nature. None of comments made during the broadcast was aimed at criticizing discrimination on the grounds of race. On the contrary, the behaviour of both presenters indicated that mockery and scorn addressed to persons of different ethnic origin is natural and socially acceptable. In its judgment, the CA referred to the provisions of Article 18(1) of the BA and its interpretation in the judgments of the SC. It did not refer to the ECHR or to the judgments of the ECtHR.

f. Comments

The Council of Media Ethics made a statement that *Poranny WF* contained racist content. According to this body, the content of the programme went beyond the acceptable limits of satire and ethical journalism. Furthermore, it violated the rules of respect and tolerance.[166]

iii. Tarnishing the National Flag

a. Case Description

On 25 March 2008 TVN S.A. transmitted the *Kuba Wojewódzki Show*. The idea of this programme is based on inviting quests by the host Wojewódzki, who is well-known for his controversial manner of behaving. In the programme in question two guests participated. One of them, Marek Raczkowski, is known for his protests against the fouling of cities by dogs. His protest consisted of shoving miniature Polish flags into dog excrement left on urban places. At the beginning of the programme, Wojewódzki introduced Raczkowski as a man created in the media out of dog excrement.

Wojewódzki asked his guests to repeat this protest at the television studio, and they agreed to shove miniature Polish flags into replicas of dog excrement. The host himself refused to do it. Shoving the flag into the aforementioned replicas was done with background music composed for the film *Polskie drogi*, a series on the fates of Polish people in September 1939 and under the Nazi occupation.

165 The judgment was made available by the AC in Warsaw at my request.

166 Oświadczenie Rady Etyki Mediów, 7 June 2011, http://www.radaetykimediow.pl/index.php?option=com_content&view=article&id=192:owiadczenie-rady-etyki-mediow-7-czerwca-2011-roku&catid=15:2011&Itemid=4.

After the transmission of the programme an appeal for the protection of the flag was issued on the website www.w-obronie-flagi.polonews.pl to which more than 10,000 people responded. Furthermore, a discussion started on how the national symbols should be used.

b. Argumentation of the Chairman of the Council

In the decision of 16 May 2008,[167] Chairman of the KRRiT imposed a fine on TVN S.A. The Chairman argued in its decision that the programme encouraged actions contrary to the law by violating the veneration of and respect for the national colours. The Chairman also indicated that programme propagated attitudes and beliefs contrary to moral values and social interests by showing a lack of respect for patriotic values or for the feelings of other persons. The Chairman referred in the decision to Article 10 of the ECHR emphasizing that the freedom of speech is not an absolute one.

c. Argumentation of TVN S.A.

TVN S.A. argued that both the author of the programme and his guests had no intention to insult the national flag and the patriotic feelings of other persons. The idea of their behaviour was to start a discussion on the use of national symbols. The national flag was used in the programme with the intention of highlighting a social problem, not in order to propagate the insulting of national symbols. The problem that persons participating in the programme intended to highlight was the fouling of public spaces by dogs. Furthermore, as TVN S.A. indicated, the programme in question was of a satirical nature, and therefore the scope of freedom of speech is wider in this case, which should also be taken into account by the Chairman of the KRRiT and the courts judging the matter.

d. Judgment of 26 August 2009 of the Regional Court in Warsaw, XX GC 491/08[168]

The Regional Court did not concur with the arguments raised by the Chairman of the KRRiT, and overruled the decision imposing a fine on TVN S.A. The Court expressed the opinion that insult means violating the dignity of a person. Thus, in the Regional Court's opinion, an activity may be considered as an insult only if it is intentional and aimed at insulting someone. Therefore, in the case in question, the national flag and the patriotic feelings of other persons were not insulted because the behaviour of Wojewódzki and his guests was not aimed at insulting anyone. On the contrary, their intention was to provoke social discussion on the use of national symbols.

167 Decision No 6/2008 (16 May 2008) of the Chairman of the KRRiT, made available by the Chairman at my individual request.

168 http://orzeczenia.ms.gov.pl/search/simple/N/XX0020GC$0020491$002f08/$N/$N/1.

e. Judgment of 11 August 2011 of the Appeal Court in Warsaw, VI ACa 867/10[169]

The CA in Warsaw agreed with the arguments of the Chairman of the KRRiT. It indicated that attitudes and beliefs contrary to the moral values should be interpreted as attitudes and beliefs which are not included in the catalogue of moral values accepted by the whole of society. The system of moral values of Polish society includes respect for national symbols. This is a value of special importance in Polish society, taking into account the history of Poland that gives national symbols special meaning. Respect for the national symbols is not only an obligation but also the right of every person. National symbols in the aforementioned meaning constitute a common good of the whole of society, and they constitute also a personal good of every citizen. The CA argued that dog's excrement has negative associations. Therefore, associating a good or person with dog's excrement is humiliating to a person or to the value represented by the good.

The CA emphasized that citizens have the right that national symbols be respected by other persons. The Court quoted here Article 10(2) of the ECHR indicating that the aforementioned right constitutes a borderline of other persons' freedom of speech.

f. Judgment of 2 July 2013 of the Supreme Court, III SK 42/12[170]

The Supreme Court concurred with the CA's opinion, basing its judgment on extensive deliberation about two models of freedom of speech: that enacted in the ECHR and that enacted in the Constitution of Poland. The Supreme Court's deliberations on the provisions of the ECHR regulating the freedom of speech were based on an analysis of Article 10 of the ECHR. The Supreme Court also referred to many judgments of the ECtHR in which the provisions of Article 10 of the ECHR were interpreted. Taking into account the aforementioned judgments, the SC emphasized that the freedom of speech does not have an unrestricted nature. Exercising this right by every subject is strictly connected with certain obligations and responsibility. Thus, the freedom of speech may be subject to restrictions. The Supreme Court referred to the test of assessment of the legality of restricting the freedom of speech as formulated in the ECtHR's case law and in Article 10(2) of the ECHR.

In its judgment, the SC also referred to the regulation of freedom of speech in the Constitution of Poland. It emphasized that although the freedom of speech is subject to protection pursuant to Article 54 of the Constitution, the exercise of it may be subject to limitations according to Article 31(2) of the Constitution. The Supreme Court argued that the role of the media and of the freedom of speech in the functioning of a democratic society is so important that state interference in the exercise of it can be undertaken only exceptionally, and requires sufficient justification.

The Supreme Court did not concur with the opinion of the TVN S.A., and decided that the programme had indeed encouraged actions contrary to the law. In the SC's opinion such a conclusion can be reached on the basis of the circumstances of the case, eg, the behaviour

169 http://orzeczenia.ms.gov.pl/search/simple/N/VI0020ACa$0020867$002f10/score/descending/1.
170 http://www.sn.pl/Sites/orzecznictwo/Orzeczenia2/III per cent20SK per cent2042-12-1.pdf.

of the programme participants who seemed to be enjoying themselves, the applause of the audience and the status of the host of the programme who is perceived as a TV idol. The Supreme Court argued that venerating and respecting the national symbols is the right and obligation of every Polish citizen. Thus, everyone who venerates and respects the flag, also has the right to expect that the flag be respected and venerated by other citizens. In other words, if the flag is not respected and venerated, the rights of the aforementioned persons are violated. In the case in question, shoving miniature Polish flags into replicas of dog excrement undoubtedly did not serve to start a public debate on the fouling of public spaces by dogs. Also, the SC did not share the opinion of the TNV S.A. that the programme in question was of a satirical nature because the behaviour of the host and his guests neither ridiculed nor stigmatized the occurrence of fouling public spaces by dogs. Even if it had been satirical, the limits of protecting freedom of satirical speech were still exceeded. According to the SC, the desecration of the flag that occurred in the *Kuba Wojewodzki Show* violated other persons' feelings. The flag is a symbol of special meaning in Poland that should be venerated and respected by everyone, and the right of every person to venerate and respect precedes the freedom of speech in the case in question.

g. Comments

The newspapers were not unanimous in their response to the judgment of the SC. One of the leading daily papers in Poland, *Rzeczpospolita*, expressed its support for the aforementioned judgment.[171] Another leading daily paper, *Gazeta Wyborcza*, however, argued that the problem of the fouling of cities by dogs is a national problem that should be highlighted by using drastic means. It also indicated that many persons whose patriotic feelings were violated by the programme in question are not outraged about showing the flag together with a swastika or other symbols of this kind. Also, it accused the Chairman of the KRRiT of protecting the flag and patriotic feelings by imposing a fine on TVN S.A., while its reaction to anti-Semitic speech on Radio Maryja was only an admonition.[172]

iv. Mimicking a Disabled Person

a. Case Description

On 26 February 2006 TV Polsat S.A. transmitted an episode of Kuba Wojewódzki's programme. Its guest was Kazimiera Szczuka, a well-known journalist and feminist activist. Wojewódzki and Szczuka discussed the idea of her being a presenter of Radio Maryja and TV Trwam. One of the subjects discussed by Wojewódzki and Szczuka was the activity of Magdalena Buczek, a journalist of the Catholic radio and of TV Trwam. Szczuka described Buczek as an 'old girl' when she commented on her activity organizing Catholic street rosary

171 M Szułdrzyński, 'Przestroga dla ufajniaczy patriotyzmu' http://www.rp.pl/artykul/1025667.html.
172 E Siedlecka, 'Flaga w psich kupach a patriotyzm. Dlaczego sąd podtrzymał karę dla TVN?' http://wyborcza.pl/1,76842,14217542,Flaga_w_psich_kupach_a_patriotyzm__Dlaczego_sad_podtrzymal.html.

groups for children. Szczuka started mimicking the voice of Buczek, quoting the words of a prayer that she says when she addresses children.

It should be added that Buczek is a disabled person who uses a wheelchair, and her special tone of voice is a consequence of her disease. However, neither Wojewódzki nor Szczuka possessed knowledge of this fact. Moreover, at the beginning of her comment, Szczuka indicated that she did not know who Buczek was, and she did not even know her name.

Buczek organizes Catholic street rosary groups that have 120,000 participants in 28 countries. After the transmission of the programme, many persons complained to the KRRiT that it violated their religious feelings and the dignity of disabled persons.

b. Argumentation of the Chairman of the Council

In the decision of 22 March 2006,[173] Chairman expressed the opinion that the programme in question violated the dignity of Buczek and the religious feelings of the public especially children participating in the street rosary groups. The Chairman noted that human dignity has a special value in light of Article 30 of the Constitution. Moreover, personal goods are protected under Article 23 of Civil Code and Article 18 of the BA, which prohibits encouraging actions which infringe personal goods.

c. Argumentation of TV Polsat S.A.

TV Polsat S.A. argued that neither Wojewódzki nor Szczuka knew that Buczek is a disabled person, therefore the comments on her behaviour did not relate to her disability. Furthermore, Wojwódzki's programme is well-known for its openness to the controversial views presented by the host and his guests. According to TV Polsat, the decision of the Chairman of the KRRiT infringed Article 10 of the ECHR.

d. Judgment of 15 November 2007 of the Regional Court in Warsaw, XX GC 592/06[174]

The Regional Court in Warsaw decided that the Wojewódzki programme violated the human dignity of Buczek. The Regional Court referred in its judgment to the Articles 18(1) and 18(2) of the BA, which prohibit any programmes or broadcasts that encourage actions contrary to the law or do not respect the religious beliefs of the public. The Court emphasized that the personal goods of every human are protected under civil law by Articles 23 and 24 of the CC. It shared the opinion of the SC that the decisive factor for the violation of the personal good of certain person is not her/his subjective feeling but the reaction of society. The Court also indicated that the violation of human dignity occurs once the good name is tarnished, when a person is accused of improper behaviour in her/his professional or public activity. According to the RC, ridiculing the

173 Decision No 2/2006 (22 March 2006) of the Chairman of the KRRiT, made available by the Chairman at my request.

174 The judgment was made available by the RC in Warsaw at my request.

activity of Buczek by Wojewódzki and Szczuka could damage her good name. The Court referred in its judgment to Article 10 of the ECHR which states that the freedom of speech is not an absolute one and its limits are indicated by the rights of other persons, for instance personal goods.

e. Judgment of 8 October 2008 of the Appeal Court in Warsaw, VI Aca 332/08[175]

The CA shared the opinion of the Chairman of the KRRiT that the programme violated religious feelings of other persons and human dignity (personal goods) of Buczek. The CA referred to Article 10 ECHR, emphasizing that the freedom of speech is not an absolute right. The scope of freedom of speech is delimited, eg, in Articles 23 and 24 of the CC that pertain to protection of personal goods. The CA noted that neither Wojewódzki nor Szczuka knew that Buczek was a disabled person, but it expressed the view that this fact did not absolve them of responsibility for preparing the programme with due care and accuracy, which is their obligation regulated in Article 12 of the Press Law.

f. Judgment of 14 January 2010 of the Supreme Court, III SK 15/09[176]

The Supreme Court shared the opinion of the Chairman of the KRRiT and courts of lower instances that parodying Buczek's manner of speaking by saying a prayer, Szczuka violated religious feelings of other persons, humiliated the prayer and Buczek's public activity. The Supreme Court referred in its judgment to Article 10 of ECHR and its interpretation in ECtHR's judgments. It expressed the opinion that freedom of speech is not an absolute right and its limits are demarcated for instance by the rights of other persons, especially by the right to good name. Furthermore, according to the SC, the behaviour of Szczuka was insulting to Buczek, without any reason. The Supreme Court also referred in its judgment to Article 18(2) of the BA that states that programmes and other broadcasts shall respect the religious beliefs of the public, and especially the Christian system of values.

g. Comments

The judgment of the SC was commented in the Polish legal literature, eg, Michał Zawiślak expressed the same opinion as the Supreme Court did.[177]

The Council of Media Ethics made a statement that Szuka cannot be accused of mocking disabled persons because she was not aware of Buczek's disability. The Council of Media Ethics admitted, however, that the speech of Szczuka violated the religious beliefs of Catholics, but held that the Chairman of the KRRiT should not impose high fines on broadcasters since it deepens social divisions, and hinders the understanding of the freedom of speech.[178]

175 The judgment was made available by the CA in Warsaw at my request.
176 http://www.sn.pl/Sites/orzecznictwo/Orzeczenia2/III per cent20SK per cent2042-12-1.pdf.
177 M Zawiślak, 'Wyrok SN z dnia 14 stycznia 2010 r., III SK 15/09' *Przegląd Prawa Wyznaniowego* 3 (2011) 115.
178 Oświadczenie Rady Etyki Mediów, 22 March 2006, http://sdp2.home.pl/dokumenty_rem2006_6.html.

VIII. Prohibition of Hate Speech

The notion of hate speech is not defined in Polish law. Moreover, it is applied in various different contexts. Legal scholars have defined hate speech as speech of highly offensive nature (insulting, hateful) that is addressed to a person or a group of persons who have characteristics that discredits these persons in the opinion of the speeker. Such a discrediting characteristic may be, eg, race, nationality, religious beliefs, political views, gender. Hate speech is both speech that incites hatred and speech that expresses it. It is important to note that hate speech may be aimed at inciting hatred towards persons who belong to a minority and also to persons belonging to the majority. [179]

As has already been mentioned, Article 18(1) of the BA contains a general clause prohibiting the transmission of programmes and other broadcasts that encourage actions contrary to the law and to Poland's reason of state or which propagate attitudes and beliefs contrary to moral values and the interests of society. Further, the legislator explains that the aforementioned clause relates in particular to the inclusion in programmes of contents inciting hatred or discrimination on the grounds of race, disability, sex, religion, or nationality. Also, programmes provided as part of on-demand audiovisual media services cannot contain contents inciting hatred or discriminating on the grounds of race, disability, sex, religion, or nationality (Article 47h BA).

Hate speech is penalized under Polish criminal law, and indeed the Penal Code (PC) contains provisions that pertain to hate speech. For instance, Article 256(1) of the PC states that anyone who incites hatred based on national, ethnic, race or religious differences, or for not being religious is liable to a fine, restriction of liberty, or imprisonment for up to two years. Anyone who distributes, produces, records, handles, acquires, stores, possesses, presents, carries, or sends any print, recording or other object having the content described above is liable to the same penalty (Article 256(2)). However, the offender does not commit the offence of inciting to hatred if the activity is conducted for artistic, educational or scientific reasons (Article 256(3)).

When discussing the topic of penalizing hate speech in the Polish PC, Article 257 should also be mentioned. It states that anyone who publicly insults a group or an individual because of their national, ethnic, racial, religious affiliation, or because of not being religious, or breaches the personal inviolability of another individual for such a reason is liable to imprisonment for up to three years.

It is interesting that some broadcasters in Poland are well-known for inciting hatred. Amongst them, the most popular is Radio Maryja, which very often attacks certain groups or assents to such attacks by guests invited onto its programmes, or to their listeners.[180] There is no doubt that the content of programmes transmitted on Radio Maryja very often incite to hatred. Therefore it is astounding that to date the Chairman of the KRRiT has not sanctioned Radio Maryja for inciting hatred.

179 Lis, Wolność wypowiedzi (n 148) pt 2.

180 R Maszkowski, 'Mowa nienawiści w Radiu Maryja (głos w dyskusji)' A Bodnar, A Gliszczyńska-Grabias, R Wieruszewski, M Wyrzykowski (eds), *Mowa nienawiści a wolność słowa. Aspekty prawne i społeczne* (Warszawa, Wolters Kluwer, 2010) 263–80.

A. Case Studies Concerning Hate Speech

There is only one case concerning the hate speech in which a decision of the Chairman of the KRRiT was appealed against before the RC. Both courts that gave judgments in this case were of the opinion that the programme in question had a content which exceeded the limits of freedom of speech. The Regional Court and the CA invoked in their judgments Article 10 of the ECHR. The Regional Court also referred to the Declaration on Freedom of Political Debate in the Media adopted by the Council of Europe, and the CA referred to Article 19 of the ICCPR.

i. Discriminating Against Persons of Ukrainian Nationality

a. Case Description

A programme entitled *Poranny WF* was broadcast on Radio Eska ROCK. As has been mentioned previously, the presenters of *Poranny WF*, Michał Figurski and Kuba Wojewódzki, typically imitated certain persons. On 12 June 2012, Wojewódzki and Figurski discussed the European Cup organized in Poland and Ukraine, expressing their opinion that the chances of the Polish football team are meagre because it only drew in a match against Greece while the Ukrainian team had beaten Sweden. During the programme, the following discussion took place: Wojewódzki: 'Do you know what I did yesterday, after the match with Ukraine?' Figurski: 'Yeah?' W: 'I behaved like a real Pole.' F: 'You kicked the dog.' W: 'No, I fired my Ukrainian.' F: 'That was a good idea. You know what? I will not pay mine.' W: 'You know what? I will restore mine to her job, take her money away, and fire her again." F: 'I tell you what, if mine was prettier I would also raped her.' W: 'I do not know how mine looks like since she is always on her knees.'

After the programme was transmitted, 23 complaints were filed with the KRRiT. It is worth mentioning that after the decision to impose the fine on Eska ROCK was issued, the broadcaster took the programme off the air, and ceased employing Wojewódzki and Figurski.

b. Argumentation of the Chairman of the Council

In his decision of 30 June 2012[181] the Chairman of the KRRiT argued that the limits of satire were exceeded in the programme in question, because it violated human dignity. Furthermore, the views presented by Wojewódzki and Figurski incited hatred. The Chairman's decision contains reference to Article 10 of ECHR as well as to the judgment of the ECtHR concerning the limits of freedom of speech.

181 Decision No 7/2012 (30 July 2012) of the Chairman of the KRRiT, http://www.krrit.gov.pl/Data/Files/_public/Portals/0/konsultacje/decyzja-poranny-wf-ws.-ukrainek--.pdf.

c. Argumentation of Eska ROCK

Eska ROCK argued that the programme in question is of a satirical nature, in which the views presented are exaggerated in order to deride intolerance. It admitted that the presenters of said programme balanced on the verge of good taste and satirical convention. Eska ROCK also emphasized that Wojewódzki and Figurski are well-known for their openness to other people's individuality and for their tolerance. Their intention was not to discriminate against or humiliate anybody. On the contrary, the programme was aimed at exposing xenophobic views by using artistic expression.

d. Judgment of 14 August 2013 of Regional Court in Warsaw, XX GC 757/12[182]

In the extensive justification of its sentence, the RC referred to the provisions of Articles 14 and 54(1) of the Constitution. It also referred to Article 10 of ECHR. It is worth indicating that the Regional Court expressed the opinion that when interpreting the provisions of the BA, the judgments of the ECtHR should be taken into account. According to the RC, Articles 18(1)–(2) of the BA contains provisions that limit the freedom of speech that should be assessed in the light of Article 10(2) of the ECHR.

Bearing the above in mind, the Regional Court emphasized that the freedom of speech exercised by journalists allows for exaggeration or provocation. It indicated that if a given programme is of satirical nature, it can have content which is more exaggerated and provocative than other programmes. The Regional Court based its opinion on the Declaration on Freedom of Political Debate in the Media adopted by the Council of Europe.

The Court shared the opinion that the programme in question was of satirical nature, commenting on current political, social, and artistic events. The content of the programme is aimed at deriding or distorting reality, often in an absurd manner. The presenters set the humorous, irreverent, ironic, cutting, and even ridiculing tone of the programme. According to the RC, while journalistic speech of satirical nature is always directed at somebody or something, it has so strong influence that moulds social attitudes.

In the opinion of the RC, the programme *Poranny WF* had content extraordinarily insulting to persons of Ukrainian nationality and to women in general. According to the RC, the programme contained elements of hate speech and discrimination on the grounds of gender and nationality. The speech of Wojewódzki and Figurski could be construed as inciting hatred for persons of Ukrainian nationality. Furthermore, the programme violated the dignity of women when it referred to committing rape on Ukrainian cleaning ladies. Therefore the broadcaster exceeded the acceptable limits of the freedom of speech, and violated Article 18(1) of the BA.

e. Judgment of 20 August 2014 of the Appeal Court in Warsaw, VI ACa 1740/13[183]

The CA shared the view of the RC that the programme *Poranny WF* exceeded the acceptable limits of the freedom of speech. The CA raised similar arguments to those of the RC, that the

182 www.orzeczenia.ms.gov.pl.

183 http://orzeczenia.ms.gov.pl/content/$N/154500000003003_VI_ACa_001740_2013_Uz_2014-08-20_002.

programme violated human dignity, and constituted hate speech. It referred in its judgment to national regulations pertaining to the freedom of speech and the limits thereof. It also referred to Article 10 of the ECHR as well as to Article 19 of the ICCPR.

f. Comments

One of the most popular weekly magazines in Poland expressed its support for imposing a fine on Radio Eska ROCK. It emphasized that Wojewódzki and Figurski assumed the role of clowns, thanks to which they gain recognition, but sometimes the best course is to stop talking.[184]

The programme was also criticized by the Council of Media Ethics, describing its content as typical hate speech and gross loutishness. In its opinion, Wojewódzki and Figurski presented xenophobic and racist views by which they exceeded the limits of satire and ethical journalism.[185]

Pursuant to the Report on hate speech, only 5 per cent of young people and 6 per cent of adults are of the opinion that the speech of Wojewódzki and Figurski should be allowed, while 86 per cent of young people and 92 per cent of adults considered speech of this kind to be insulting.[186]

IX. Balanced Coverage

The provisions of the BA that pertain to balanced coverage are addressed only to public radio and television, and are connected with their public mission. According to Article 21(1) of the BA, the public mission of public radio and television is carried out by providing the entire society and its individual groups with diversified programme services and other services in the area of information, journalism, culture, entertainment, education, and sports. The programmes listed above should be pluralistic, impartial, well balanced, independent and innovative, and marked by high quality and the integrity of the broadcast. Furthermore, the programme services of public radio and television should provide reliable information about the vast diversity of events and processes taking place in Poland and abroad (Article 21(2)); encourage an unconstrained development of citizens' views and the formation of public opinion (Article 21(3)); enable citizens and organisations to take part in public life by expressing diversified views and approaches as well as exercising the right to social supervision and criticism (Article 21(4)).

It should be emphasized that the requirements of balanced coverage are addressed only to public radio and television. As regards other broadcasters, they are not obligated to ensure balanced coverage unless such obligation was imposed upon them in the licence. Programmes which provide reliable and impartial information and diverse opinions reflect

184 J Cieśla, 'Wojewódzki i Firgurski na złej fali', http://www.polityka.pl/tygodnikpolityka/kraj/1528317,1,eska-rock-i-obrazanie-ukraincow.read.

185 Stanowisko Rady Etyki Mediów, 24 June 2012, http://www.radaetykimediow.pl/index.php?option=com_content&view=article&id=230:stanowisko-rem-z-24-czerwca-2012-r&catid=33:nasze-stanowisko&Itemid=40.

186 M Bilewicz, M Marchlewska, W Soral, M Winiewski, *Mowa nienawiści. Raport z badan sondażowych* (Warszawa, Fundacja im. Stefana Batorego, 2014) 5, 45.

the obligation imposed on journalists in the Code of Ethics for Journalists[187] adopted by the Polish Journalists Association. However, the membership of the Polish Journalists Association is voluntary, and the Code of Ethics for Journalists is not binding for every journalist who works in radio or television.[188]

The issue of balance coverage in Poland is also discussed in the legal literature. Some authors indicate that it is connected with the freedom of speech, and constitutes a source of regulatory competences of the State. Pluralism is a ratio of public media system. Pluralism is reflected in the aforementioned obligations imposed upon public media in Poland in Articles 21(2)2–4 of the BA. All these obligations lead to the order of retaining the internal pluralism in media. It pertains mainly to information and feature programmes, but other kinds of programmes should also present diversity of opinions, beliefs and political, philosophical, scientific, artistic, and religious trends.[189] There are no decisions of the Chairman of the KRRiT or judgments of the courts concerning the balanced coverage.

A. Case Studies Concerning Balanced Coverage

According to the author's knowledge the Chairman of the KRRiT has not adopted any decisions concerning balanced coverage that have been appealed against to the Regional Court in Warsaw.

X. Commercial Communications

The Polish legislator defines commercial communications as any broadcast that is designed to promote, directly or indirectly, the goods, services or image of an entity pursuing an economic or professional activity. Such a broadcast accompanies or is included in a programme in return for payment or for similar consideration or for self-promotional purposes. It includes particular advertising, sponsorship, teleshopping, and product placement (Article 4(16) of the BA).

The decisions of the Chairman of the KRRiT analysed here pertain to surreptitious commercial communications in programmes transmitted on the radio and television. As has already been mentioned, the BA prohibits commercial communications of this kind (Article 16c(1)). Surreptitious commercial communications means the representation of the goods, services, name, business name, trademark, or activities of an entrepreneur who produces goods or provides services. Commercial communications are of surreptitious nature when the intention of the media service provider is to achieve an advertising effect, in particular in return for a payment or another benefit, and when the public might be misled as to the nature of the communication (Article 4(20)).

The broadcaster is obligated to ensure that all commercial communications are readily recognizable (Article 16(1)). Moreover, advertising and teleshopping should be readily

187 Kodeks Etyki Dziennikarskiej Stowarzyszenia Dziennikarzy Polskich, http://www.sdp.pl/s/kodeks-etyki-dziennikarskiej-sdp.

188 For more extensive review of codes of ethics for journalists, see, Jaskuła, *Prawo* (n 150) 253–55.

189 Piątek, Dziomdziora, Wojciechowski, *Ustawa* (n 21) 276.

distinguishable from editorial content. Keeping them distinct from other parts of the programme service should be guaranteed by optical, acoustic, or spatial means (Article 16(2)). These means should be placed at the beginning and at the end of the block (Paragraph 3(1) Reg.Adv.).[190] The identification of advertising should contain the word 'advertisement' and the identification of teleshopping should contain the word 'teleshopping' (Paragraphs 3(2) and (4) Reg.Adv.).

A. Case Studies Concerning Commercial Communications

As has already been mentioned, the cases analysed in this paper concerned only surreptitious commercial communications. In every judgment given as a result of an appeal lodged against the decision of the Chairman of the KRRiT, the courts shared his arguments. It is worth noting that both the RC and the CA limited their reasoning to analyses of the provisions of the BA, and neither of them referred to the freedom of speech. They did not invoke any international source pertaining to the freedom of speech either. Some of these reasonings do, however, contain reference to EU directives and to the judgments of the Court of Justice of the EU.

i. Surreptitious Commercial Communications in Radio Maryja—Scene 1

a. Case Description

In a programme transmitted on 11 May 2011 on Radio Maryja, the presenter promoted the daily newspaper *Nasz Dziennik* by encouraging listeners to buy it and read it. Also, the private university Wyższa Szkoła Kultury Społecznej i Medialnej w Toruniu was presented as a university with a very good reputation. Wyższa Szkoła Kultury Społecznej i Medialnej was the subject of a programme transmitted on 12 May 2011 during which it was presented only in a positive light as a leading university in Poland and abroad. A programme of a similar content was also transmitted on 16 May 2011.

b. Argumentation of the Chairman of the Council

In the decision of 30 March 2012,[191] the Chairman of KRRiT expressed the opinion that the programme in question contained surreptitious commercial communications. It concerned mainly a private university which is a separate legal entity to Radio Maryja. By presenting the university in an explicitly positive way, the broadcaster intended to achieve an advertising effect.

190 Rozporządzenie Krajowej Rady Radiofonii i Telewizji z dnia 30 czerwca 2011 r. w sprawie sposobu prowadzenia w programach radiowych i telewizyjnych działalności reklamowej i telesprzedaży, Dz.U. 2014, Poz. 204.
191 Decision No 4/2012 (30 March 2012) of the Chairman of the KRRiT, http://www.krrit.gov.pl/Data/Files/_public/Portals/0/komunikaty/kp2012/listy_zalaczniki/30032012_decyzja_radio_maryja.pdf.

c. Argumentation of Warszawska Prowincja Redemptorystów

Warszawska Prowincja Redemptorystów argued that the programme in question did not contain surreptitious commercial communications.

d. Judgment of 19 of July 2013 of Regional Court in Warsaw, XX GC 335/12[192]

The Regional Court decided that the programme transmitted on Radio Maryja on 11, 12, and 16 of May 2011 contained surreptitious commercial communications that are prohibited on the basis of Article 16c of the BA. According to the RC, it is obvious that the broadcaster intended to achieve an advertising effect by transmitting the aforementioned communications. Thus, the programme contained surreptitious commercial communications even though the broadcaster did not receive remuneration for transmitting it. The court did not refer to the provisions of the ECHR.

ii. Surreptitious Commercial Communications in Radio Maryja—Scene 2

a. Case Description

The programme in question was transmitted on Radio Maryja on 3 and 4 December 2011. On 3 December, the programme concerned the celebration of the commemoration of the twentieth anniversary of Radio Maryja. The programme consisted of coverage of the celebration by Dariusz Dereżek, who visited the venue of the celebration. During his stay at the aforementioned place, Dereżek visited several departments, and interviewed sellers of TV receivers, a telecommunications mobile operator, and an entity offering bank services. After every interview, he encouraged the public to buy the goods or services he spoke about with their sellers. On the programme transmitted on 4 December, Tadeusz Rydzyk said in turn that an institute of higher education, the Wyższa Szkoła Kultury Społecznej i Medialnej w Toruniu, which is connected with the Warszawska Prowincja Redemptorystów, has the lowest tuition fees in Poland.

It is worth mentioning that Radio Maryja is well-known for broadcasting programmes containing surreptitious commercial communications. Before the decision was adopted, the Chairman of the KRRiT had already issued two decisions imposing fines for broadcasting this kind of commercial communications. Also, the decision described in this chapter was followed by other decisions of the Chairman of the KRRiT in which fines for such activity were imposed on the Warszawska Prowincja Redemptorystów.

192 http://orzeczenia.ms.gov.pl/search/simple/N/XX0020GC$0020335$002f12/$N/$N/1.

b. Argumentation of the Chairman of the Council

In the decision of 11 July 2012,[193] the Chairman of KRRiT argued that the programme transmitted on Radio Maryja contained surreptitious commercial communications due to the fact that the commercial content was not readily recognizable and distinguishable from editorial content. It could be received by the public as objective information on goods and services mentioned during the programme.

c. Argumentation of Warszawska Prowincja Redemptorystów

Warszawska Prowincja Redemptorystów, the organization which broadcasts Radio Maryja, argued that it has the status of a social broadcaster, and therefore it did not charge any fees for promoting press titles and private schools. Moreover, the subjects promoted on Radio Maryja are connected with its mission. It also claimed that it did not have any intention of achieving an advertising effect. The programme in question contained solely coverage of the commemoration of its twentieth anniversary. During the programme certain events were presented and also representatives of entities cooperating with Radio Maryja were interviewed.

d. Judgment of 23 July 2013 of the Regional Court in Warsaw, XX GC 653/12[194]

The Regional Court did not share the opinion of Warszawska Prowincja Redemptorystów. It emphasized the general nature of the prohibition of broadcasting of surreptitious commercial communications. The Court expressed the opinion that a commercial communications is surreptitious if three conditions are fulfilled. The first condition concerns the content of communications, the second one relates to its broadcaster, and the third one relates to the public's reaction to the communications. In its judgment, the RC analysed whether the three conditions were fulfilled in the programme in question.

In the opinion of the RC, the programme contained surreptitious commercial communications. The aim of the programme was to describe the commemoration of the twentieth anniversary of the radio station, and the commercial communication in question disrupted the structure of the programme due to its different aims. The commercial communications was aimed at promoting goods, services, or the image of an entity pursuing economic or professional activity. The Court emphasized that the intention of the broadcaster was to achieve an advertising effect by encouraging listeners to purchase certain goods and services.

193 Decision No 6/2012 (11 July 2012) of the Chairman of the KRRiT, http://www.krrit.gov.pl/Data/Files/_public/Portals/0/regulacje-prawne/polska/lista-waznych-wydarzen/decyzja-dot.radia-maryja.pdf.

194 http://orzeczenia.ms.gov.pl/details/$N/154505000006027_XX_GC_000653_2012_Uz_2013-07-24_001.

e. Judgment of 17 June 2014 of the Appeal Court in Warsaw, VI ACa 1562/13[195]

The CA shared the view of the RC that the Warszawska Prowincja Redemptorystów broadcasted surreptitious commercial communications. In its analysis of the provisions of Article 16c of the BA, the CA referred to Directive 89/552/EEC[196] and judgment of the Court of Justice of the EU.

iii. Surreptitious Commercial Communications in TVP S.A.

a. Case Description

On 24 June 2011, TVP S.A. transmitted a programme entitled *Poranek TVP Info*. During the programme, a table covered with food was presented many times. Integrated in the food were small flags with a logo and the name of a meat producer. The presenters made many comments concerning the quality and aroma of the food.

b. Argumentation of the Chairman of the Council

In its decision of 12 March 2012,[197] the Chairman of KRRiT argued that due to the fact that the conditions described in Article 17a of the BA were not fulfilled, it is not possible to acknowledge that the programme in question contained product placement. In its analysis of whether the programme contained product placement or surreptitious commercial communications, the Chairman referred to the provisions of the BA as well as to Directive 2010/13/EU. The Chairman expressed the opinion that the *Poranek TVP Info* contained surreptitious commercial communications due to the fact that the following conditions were fulfilled: The products were excessively exhibited, the public was misled as to the nature of communication, and the broadcaster intended to achieve an advertising effect.

c. Argumentation of TVP S.A.

TVP S.A. argued that the programme in question contained product placement. It also indicated that the broadcaster did not intend to achieve an advertising effect, or to mislead the public as to the nature of communication.

195 www.orzeczenia.ms.gov.pl.

196 Dyrektywa Parlamentu Europejskiego i Rady nr 89/552/EEG z dnia 3 października 1989 r. w sprawie koordynacji niektórych przepisów ustawowych, wykonawczych i administracyjnych państw członkowskich dotyczących świadczenia audiowizualnych usług medialnych, Dz.Urz. L 298, 17 October 1989.

197 Decision No 1/2012 (12 March 2012) of the Chairman of the KRRiT, made available by the Chairman at my request.

d. Judgment of 24 of September 2012 of the Regional Court in Warsaw, XX GC 270/12[198]

The Regional Court emphasized that a programme contains product placement if the conditions listed in Article 17a of the BA are fulfilled. The Court referred in its judgment to Directive 2010/13/EU. Therefore, it decided in its judgment that the programme contained surreptitious commercial communications.

e. Judgment of 25 June 2013 of the Appeal Court in Warsaw, VI ACa 1613/12[199]

The CA also shared the view of the Chairman of the KRRiT that the programme *Poranek TVP Info* contained surreptitious commercial communication. The CA, however, limited its reasoning solely to an analysis of the provisions of the BA regulating commercial communication.

iv. Surreptitious Commercial Communications in Radio FAMA

a. Case Description

During a programme transmitted on Radio FAMA on 25 March 2011, the presenter encouraged the listeners to visit the Klinty coffee house that was described as a magical, romantic place, to go to a concert that would become embedded in the memory, and to go to a swimming pool for night swimming where a lot of attractions were awaiting.

b. Argumentation of the Chairman of the Council

In the decision of 5 July 2011,[200] the Chairman of the KRRiT decided that Radio FAMA transmitted programmes that contained surreptitious commercial communications.

c. Argumentation of Agencja Radiowo Telewizyjna FAMA Sp.z o.o.

Agencja FAMA explained that the aforementioned information was transmitted on the radio because it has an obligation to transmit information of a cultural nature.

198 http://orzeczenia.ms.gov.pl/search/simple/N/XX0020GC$0020270$002f12/$N/$N/1.
199 Judgment was made available by the Appeal Court in Warsaw at my request.
200 Decision No 14/2011 (5 July 2011) of the Chairman of the KRRiT, made available by the Chairman at my request.

d. Judgment of 31 of January 2012 of the Regional Court in Warsaw, XX GC 534/11[201]

According to the RC, the programme contained surreptitious commercial communications. The Court referred in its judgment to Directive 89/552/EEC. The Regional Court did not share the view of the broadcaster that the programme contained content of an informative nature. It emphasized that the intention of broadcaster was to achieve an advertising effect, and to mislead the public as to the nature of information it transmitted.

XI. Protection of Minors

The BA contains a whole range of provisions concerning the protection of minors. The BA does not provide for the definition of minor. Therefore, in the legal literature,[202] it is recommended to apply provision of Article 10 of the CC. Pursuant to its provisions, '[a] n adult is a person who has attained eighteen years of age.' This wording means that every person who has not attained 18 years of age is a minor in the meaning of the CC.

The children's programme is defined as a programme which, in the view of transmission hours and its content, is addressed primarily at children (Article 10 of the BA). The BA provides for the three categories of children's programmes. The first category contains programmes and other broadcasts threatening the physical, mental, and moral development of minors. The second category contains programmes and broadcasts that contain scenes or contents which may have an adverse impact upon a healthy physical, mental, or moral development of minors. The third category of children's programmes contains all programmes and broadcasts that do not belong to either category described above.

Polish law prohibits transmission of programmes and other broadcasts threatening the physical, mental, or moral development of minors. This prohibition is an absolute one, and refers in particular to programmes and other broadcasts that contain pornography or exhibit gratuitous violence (Article 18(4) of the BA). As it is explained in the legal literature, Article 18(4) of the BA concerns the exhibition of physical and mental violence addressed at people and animals. By exhibiting the violence in turn, the legislator means concentrating the transmission on it, exposing it.[203]

As regards other programmes and broadcasts than the above-mentioned that contain scenes or contents which may have an adverse impact upon a healthy physical, mental, or moral development of minors, their transmission is not absolutely prohibited. They may be transmitted, however, in accordance with special conditions. Firstly, such programmes and broadcasts can be transmitted only in the specific period of time that is between 11 pm and 6 am (Article 18(5)). Secondly, the above-mentioned programmes and broadcasts should be specifically identified by broadcasters. Such identification takes place by way of displaying an appropriate graphic symbol throughout their duration in the television programmes service or by way of an oral announcement informing of the hazards arising out of their transmission in the radio (Article 18(5)a).

201 http://orzeczenia.ms.gov.pl/search/simple/N/XX0020GC$0020534$002f11/$N/$N/1.
202 Piątek, Dziomdziora, Wojciechowski, *Ustawa* (n 21) 223.
203 ibid, 224.

It is worth mentioning that Articles 18(5) and 18(5b) of the BA concern programmes and broadcasts that 'may have an adverse impact upon a healthy physical, mental, or moral development of minors.' According to the SC, such wording of the aforementioned provisions of the BA means that they should be applied in every case where there is even probability that the programme or broadcast is to have an impact upon a healthy physical, mental, or moral development of minors.[204] It is also difficult to define what the legislator means by 'healthy physical, mental, or moral development of minors'. There are opinions expressed in the legal literature[205] that this should be assessed in the light of Article 29(1) of the United Nations Convention on the Rights of the Child.[206]

As regards other programmes and broadcasts than mentioned above, they should also be properly identified by broadcasters. The identification should take place by way of displaying an appropriate graphic symbol throughout their duration in the television programme service, with due regard to the degree of harmful effect of the given programme or broadcast upon minors in a particular age group (Article 18(5b)BA).

The Regulation of the KRRiT concerning the classification of programmes or other broadcasts[207] provides for the following categories of classifying the programmes or other broadcasts: (1) Category I: transmission without any restrictions in terms of age and hours; (2) Category II from 7 years of age: transmission without any restrictions in terms of hours; (3) Category III from 12 years of age: transmission without any restrictions in terms of hours; (4) Category IV from 16 years of age: transmission after 8 pm (Paragraph 5 (4)).

The identification of the programmes transmitted in the television should take place in the form of graphic symbols displayed throughout the duration of the entire television transmission. The height and length of such symbols should be smaller than 2 cm placed in the upper left corner of the screen with a 21-inch diagonal (Paragraph 6 of the Regulation of the KRRiT concerning the classification of programmes or other broadcasts). It is also worth mentioning that product placement is absolutely prohibited in the children's programmes (Article 17(1) of the BA). Also commercial communications should not prejudice the physical, mental, or moral development of minors (Article 16b(3)4).

There are also special regulations concerning the protection of minors in the on-demand audiovisual media services. It is prohibited to provide to the general public on-demand audiovisual media services that contain programmes or other broadcasts threatening the healthy physical, mental, or moral development of minors. Such programmes or broadcasts can be transmitted on the condition that provider of on-demand audiovisual media service applies technical security measures or other appropriate measures to prevent minors from the reception of the programmes or broadcasts described above (Article 47e(1)).

204 Judgment of 9 March 2004 of the SC, III SK 11/04, OSNP 2004/22/393.

205 Piątek, Dziomdziora, Wojciechowski, *Ustawa* (n 21) 227.

206 Konwencja o prawach dziecka przyjęta przez Zgromadzenie Ogólne Narodów Zjednoczonych dnia 20 listopada 1989 r. (Dz. U. z dnia 23 grudnia 1991 r.).

207 Regulation of 23 June 2005 of the KRRiT concerning the classification of programmes or other broadcasts that might have adverse impact upon a healthy physical, mental, or moral development of minors, and programmes or other broadcasts intended for a given age group of minors, use of graphic symbols and forms of announcements, *Official Journal* 253 (2004) item 2531; Regulation of 12 July 2011 of the KRRiT amending the Regulation concerning the classification of programmes or other broadcasts that might have adverse impact upon a healthy physical, mental, or moral development of minors, and programmes or other broadcasts intended for a given age group of minors, use of graphic symbols and forms of announcements, *Official Journal* 155 (2011) item 923.

The legislator imposed also other obligation upon the providers of on-demand audiovisual media services that is aimed at protection of minors. They are obligated to take into account the degree of harmfulness of every programme or broadcast to minors in different groups. In consequence, every programme or broadcast transmitted by provider of on-demand audiovisual media services should be properly qualified and identified. The identifications should be made in such a way that the user can easily see the mark at the time of selecting the programme and also throughout its duration (Article 47e(2)).

The National Broadcasting Council issued a regulation concerning detailed rules of protecting minors in on-demand audiovisual media services.[208] It determines the characteristic features and specific conditions of qualifying and marking programmes and other broadcasts as well as appropriate graphic symbols, taking into account the degree of harmfulness of programmes and other broadcasts to minors in different age groups as well as the specific features of on-demand audiovisual media services (Paragraph 1).

The Regulation of the KRRiT concerning detailed rules of protecting minors in on-demand audiovisual media services also established age groups. These age groups, however, differ in comparison to the age groups established on the basis of the regulation of the KRRiT concerning the classification of programmes or other broadcasts The Regulation of the KRRiT concerning detailed rules of protecting minors in on-demand audiovisual media services also established age groups provides for the following age groups: (1) Age group I: no age restrictions; (2) Age group II: viewers aged 12 and older; (3) Age group III: viewers aged 16 and older; (4) Age group IV: viewers aged 18 and older (Paragraph 3(2)).

The age groups were established by the KRRiT, taking into account four criteria that, according to this body, are of significant importance for the development of minors. These criteria are (1) presented view of the world; (2) moral appraisal; (3) evoked emotions; (4) patterns of behaviour. Further, in its Regulation on concerning detailed rules of protecting minors in on-demand audiovisual media services also established age groups, the KRRiT describes how the criteria listed above should be applied by providers in order to qualify programmes and other broadcasts.

Group I that contains no age restrictions comprises programmes or other broadcasts that may be watched by all viewers, including children and young people. These programmes present in principle a positive (or neutrally described) view of the world, in a mild emotional climate; demonstrate prosocial attitudes and friendly approach towards people, are imbued with positive emotions such as joy, delight, happiness, kindness. They may show rivalry in the spirit of sportsmanship, with defined rules (with the exclusion of drastic scenes) and positive patterns of love (eg, romantic, caring or friendly love) without sexual images.

It should be taken into consideration that children under 12 years of age think in a schematic way, they are emotionally unstable, and their nervous system gets overcharged easily. During this period, children develop their basic approach towards the world, their critical skills are low, while the tendency to give in to suggestions as well as imitate persons around and fictitious characters very strong. Therefore, minors under the age of 12 should not watch programmes or other broadcasts that (a) present the image of the world arousing fear or disgust and negative attitude towards others and the environment, such as destruction, abuse,

208 Regulation of 5 February 2013 of the KRRiT concerning detailed rules of protecting minors in on-demand audiovisual media services, *Official Journal*, 13 February 2013, item 209.

violence, humiliation, ignoring the pain, justification of evil, even if they are presented in animated films, in an unrealistic manner or are humorous in nature; (b) present content that requires inquisitiveness and differentiation of reasons, intentions and motivation to morally appraise the behaviour of characters, which minors in this age group are not capable of doing, as well as programmes and other broadcasts that show images of a sexual nature (nudity, sexual gestures, etc.) the essence of which minors are too young to understand; (c) arouse strong, especially negative, emotions like anxiety, fear, fright, anger, disgust, indifference to the suffering of others, etc., which gives rise to an emotional distress, hyperactivity (resulting from the overload of the nervous system) in minors; contain an accumulation of negative facts and events such as violence, vulgar behaviour; create a view of a hostile and threatening world; and depict interpersonal contacts as struggle and competition; (d) show scenes of violence and sex incorporated in the film to illustrate an idea that a child is not capable of understanding because, instead of perceiving the overall message, he/she sees individual scenes of aggression, sex, and vulgarity; e) cause strong agitation associated with images of violence and dangerous activities, arouse interest in sex, ie, images of nudity and intimate contacts, especially those that depict sex in isolation from higher feelings and represent distorted patterns of sexual behaviour; f) include contents listed in the age groups described below.

As regards programmes and other broadcasts addressed to the age group II, the KRRiT explains in its regulation that adolescent children continue to exhibit high emotional excitability, they are prone to make extreme appraisals and hasty generalizations, behave impulsively, and engage in risky activities. They try to demonstrate their adulthood without a deeper understanding what it is. They are critical of parents and teachers, and, at the same time, they look for attractive idols that they emulate uncritically. They are conformist, hence standards of peer groups are more important for them than social standards. Therefore, minors under the age of 16 should not watch programmes or other broadcasts that a) show distorted forms of social coexistence (or coexistence of human beings), and restrict the view of the world to violence and eroticism; especially programmes and other broadcasts that depict them in a primitive and brutal manner, and show sexual activity in isolation from higher feelings; b) provide a simplified view of adulthood with undue prominence given to physical strength, use of violence, particularly violence demonstrated in social roles (teachers, parents, etc.); c) depict morally reprehensible behaviours and attitudes without ethical appraisal as well as moral blaming of a victim for being hurt, and show excessive concentration on possession of money and material goods; d) arouse intense feelings and emotions related to violence and sex, especially programmes and other broadcasts presenting aggression and cruelty that may provoke morally reprehensible behaviour, by showing persons who are attractive and, at the same time, represent a pattern of negative behaviours, eg, drinking alcohol, using vulgar expressions and gestures, brutality, drugs, violence, etc.

According to the KRRiT, mental functions integrate gradually in minors between 16 and 18 years of age, they develop greater autonomy, tendency to get to know themselves, and plan their adult life. However, at this age, minors continue to be highly sensitive and emotionally labile, they tend to overestimate the degree of their maturity, make crucial decisions without understanding their implications and consequences, and resolve complex existential issues in a simplified manner. Minors under the age of 18 should not watch programmes or other broadcasts with scenes or content that a) unilaterally show the privileges of adult life while ignoring duties, work, obligations as well as vital decisions while disregarding their

consequences, present social justification for aggression, vulgarity, prejudice, and negative social stereotypes, depict sex, aggression, and violation of moral norms as a source of success in life; b) present a distorted image of the human nature, ie, looking for selfish pleasures, striving for success at all costs by using other people for own purposes, justify violence, treat sex as a source of domination.

Last but not least, the KRRiT explains that age group IV, that is, viewers aged 18 and older, includes programmes or other broadcasts with sex, presented especially in isolation from emotional needs of a human being, unjustified violence, or programmes that promote behaviour towards other people that is clearly faulty. Content that presents seemingly attractive characters (eg, in terms of their looks, wealth, success, physical strength, sexual performance) whose behaviour towards others is morally reprehensible, aggressive, dishonest, and vulgar, without any assessment as to the inappropriate nature of such behaviour as well as any rewarding of social pathology, must be qualified to the age group IV that comprises content intended for persons aged 18 and older.

It is also worth mentioning that the six largest on-demand audiovisual media service providers signed a document called 'Code of Good Practice on the Protection of Minors in VOD services'. In this document, the broadcasters commit themselves to taking effective technical measures aimed at preventing minors from accessing harmful content. The Code introduced a definition of an inappropriate content that is broadcasts and other transmissions specified in Article 18(4) of the BA (ie, broadcasts or other transmissions detrimental to the healthy physical, mental, or moral development of minors, in particular content involving pornography or gratuitous violence).

The Code provides for special conditions under which technical protective measures or other appropriate means of protecting minors from inappropriate content are to be used by the broadcasters. Making on-demand audiovisual media services which include inappropriate content publically available in the programming catalogue may take place only and exclusively alongside the use of the following technical protective measures or other equivalent measures to protect minors from the aforementioned content. Such measure is for instance the system in which inappropriate content will be made accessible to the service recipient only after verifying that they are of appropriate age.

A. Case Studies Concerning the Protection of Minors

With regard to the decisions of the Chairman of the KRRiT adopted in cases analysed for the purposes of this project, it should be mentioned that they are focused on protecting the rights of minors pursuant to the regulations of Polish law. In order to back the decisions imposing fines on broadcasters, the Chairman invokes mainly provisions of Polish law. In the decisions analysed in this part, the Chairman hardly ever invokes provisions of the ECHR.

It should be mentioned that this chapter contains courts' judgments of the last 15 years. The analysis carried out for the purposes of this project contains judgments given by the RC in Warsaw as a result of appeals against the decisions of the Chairman adopted on the basis of Article 53 of BA. Due to the fact that appeals against judgments of the RC may be filed to the CA also, judgments of this court given in cases commenced by adopting the decision imposing a fine by the Chairman are analysed here. Judgments of the SC are

subject to the analysis as well if they are given as a result of a cassation complaint against the aforementioned judgment of the CA.

The detailed analysis of the judgments carried out below leads to the conclusion that Polish courts judging in cases concerning the freedom of speech focus above all on the provisions of Polish law, in particular regulations provided for in the BA. They hardly ever refer in their judgments to international law. It is also worth mentioning that in the majority of its judgments, the RC shared the view of the Chairman of the KRRiT. Only in limited number of cases the RC expressed opinion that the there was no need to protect minors in the programme in question. Judgments of the CA appear to be even more uniform as regards this issue. This is also the case for the Supreme Court's judgments. The state of facts mentioned above leads to the conclusion that courts in Poland that give judgments as a result of appeals against the decisions of the Chairman tend towards protecting minors at the costs of the freedom of speech.

In order to summarize the above, it should be noted that the broadcasters in Poland can exercise the freedom of speech as long as their activity does not arouses the opposition from the Chairman. However, it should be admitted that the Chairman very often uses so-called soft instruments in the cases arousing his doubts, and limits its activity to send a notice to a broadcaster with reservations about the content of certain programme. There are also cases in which fines were not imposed on broadcasters, but the Chairman by means of a decision called upon them to cease their practices infringing provisions of the BA. The above conclusion is of high importance in the light of predictions about the broadcaster's fate in case of adopting by the Chairman the decision in which the fine was imposed for infringing the provisions of the BA. The statistic shows that in case that the aforementioned decision was issued, and the broadcaster decided to lodge an appeal against it, the broadcaster's defeat is more than likely.

i. Probability of Adverse Impact of a Programme or Broadcast upon a Healthy Mental or Moral Development of Minors—Vulgarity and Violence

a. Case Description

On 10 January 2001, Polska Korporacja Telewizyjna transmitted a film *Malaria* directed by Spike Lee. The film was transmitted after 8 pm that was identified as available for children solely with parents' approval. The programme, however, contained vulgar and aggressive language.

b. Argumentation of the Chairman of the Council

In the decision of 28 of February 2001,[209] the Chairman of the KRRiT argued that Polska Korporacja Telewizyjna infringed Article 18(5) of the BA. The film *Malaria* was identified by the broadcaster as available for children with parents' approval although in the US its cinema version was identified as available only for adults. The Chairman expressed the view

209 Decision No 3/2001 (28 February 2001) of the Chairman of the KRRiT, made available by the Office of the Chairman on 19 November 2015 at my request.

that the language used in the film is permeated with vulgarity and aggression. The film raised problems that are difficult to understand by children, and shows pathological models of social relations. Bearing the above in mind, such film may affect emotions of children in a negative way. The Chairman noticed that the *Malaria* was transmitted at 8 pm that is in the time period reserved by the BA.

c. Argumentation of Polska Korporacja Telewizyjna

Polska Korporacja Telewizyjna argued that the film was directed by famous and highly regarded director, and it was highly valued at many film festivals. Polska Korporacja Telewizyjna also indicated that the *Malaria* was transmitted in the coded TV channel. It also argued that the US said film was identified as available for children below the age of seventeen accompanying by parent or other adult. Furthermore, according to Polska Korporacja Telewizyjna, the film does not violate morality in a drastic way.

d. Judgment of 27 September 2002 of the Regional Court in Warsaw, XX GC 588/01[210]

The Regional Court did not concur with the opinion expressed by the Chairman of the KRRiT. It referred in its judgment to Articles 18(4) and 18(5) of the BA. It also referred to the Regulation of 1994 of the KRRiT concerning the classification of programmes or other broadcasts[211] that has no binding force at the moment. The Court argued that the film does not contain pornography but vulgar, crude, broad, and insulting language as well as scenes of violence. According to the RC, it is important whether or not such a content might have had an adverse impact upon the healthy physical, mental, or moral development of minors. Therefore, the RC decided to consult an express witness who was psychologist. According to the psychologist, the content of the *Malaria* could not have had an adverse impact upon the healthy physical, mental or moral development of minors. Bearing the opinion of the psychologist in mind, the RC decided that Polska Korporacja Telewizyjna did not infringe provisions of the BA. The Court did not mention in its judgment the issue of the freedom of speech or any relating provisions of (Polish or EU) law. It merely focused on the analysis of the aforementioned provisions of the BA.

e. Judgment of 9 March 2004 of the Supreme Court, III SK 11/04[212]

The Supreme Court did not concur with the opinion expressed by the RC. In its judgment, however, the SC referred solely to provisions of the Polish law, that is, to Articles 18(4) and

210 The judgment was made available by the Regional Court in Warsaw on 24 November 2015 at my request.
211 Rozporządzenie Krajowej Rady Radiofonii i Telewizji z dnia 21 listopada 1994 r. w sprawie szczegółowych zasad rozpowszechniania przez radio i telewizję audycji, które mogą zagrażać psychicznemu, uczuciowemu lub fizycznemu rozwojowi dzieci i młodzieży, Dz. U. of 1995, No 20, item 108.
212 Legalis No 127891.

18(5) of the BA. It also referred to the Regulation of 1994 of the KRRiT concerning the classification of programmes or other broadcasts that has no binding force at the moment.

The Supreme Court indicated that Article 18(4) the BA prohibits transmission of programmes and other broadcasts threatening the physical, mental, or moral development of minors. Furthermore, this prohibition is an absolute one. Article 18(5) of the BA in turn concerns programmes and broadcasts that contain scenes or contents which may have an adverse impact upon a healthy physical, mental, or moral development of minors their transmission is not absolutely prohibited. Nevertheless, such programmes and broadcasts may be transmitted in accordance with special conditions.

The Supreme Court argued that the exegesis of the provisions quoted above leads to the conclusion that Article 1(4) of the BA contains absolute prohibition of transmitting programmes and other broadcasts mentioned thereof due to the fact that they contain the content threatening the physical, mental, or moral development of minors. This prohibition concerns every situation in which the threat for the physical, mental, or moral development of minors is real, that is, exists in fact.

The prohibition regulated in Article 18(5) of the BA is of different nature due to the fact that it refers only to situations in which a programme or other broadcast contains scenes or contents which may have an adverse impact upon a healthy physical, mental, or moral development of minors. In other words, it should be applied solely in cases where the threat for a healthy physical, mental, or moral development of minors is probable (likely to occur). Therefore transmission of such programmes and broadcasts is not strictly prohibited, however, they may be transmitted in accordance with special conditions. One of this conditions concerns the time of their transmission. Therefore such programmes and broadcasts can be transmitted only in the specific period of time that is between 11 pm and 6 am.

According to the SC, the programme transmitted by Polska Korporacja Telewizyjna contained vulgar, crude, broad, and insulting language as well as scenes of violence. Therefore it can be presumed, in the opinion of the SC, that its content made threat for a healthy physical, mental, or moral development of minors probable (likely to occur). Taking the above deliberations into account, the SC decided that Polska Korporacja Telewizyjna infringed Article 18(5) of the BA by transmitting the said programme at 8 pm because of the fact that it made the threat for a healthy physical, mental, or moral development of minors probable (likely to occur). It is worth mentioning that the SC did not refer in its judgment to the freedom of speech neither in the light of Polish Constitution or ECHR. The Supreme Court restricted its deliberations merely to the interpretation of provisions of the BA.

ii. Probability of Adverse Impact of a Programme or Broadcast upon a Healthy Mental or Moral Development of Minors—Vulgarity and Violence

a. Case Description

On 25 November 2000, Telewizja Polska S.A. transmitted a film *Dog Day*. The transmission took place at 7 pm, and was identified by the broadcaster as a film that may be watched by children only with their parents' consent. The film contained vulgar language and scenes of violence.

b. Argumentation of the Chairman of the Council

In the decision of 28 of February 2001,[213] the Chairman of the KRRiT argued that the content of the film may be qualified as violent, illustrating acts of violence in its both physical and mental dimensions. According to the Chairman, films containing such scenes should be addressed only to adult viewers whose system of values is already shaped. The Chairman emphasized that the *Dog Day* was identified by Telewizja Poska S.A. as a programme that may be watched by children with their parents' consent. The Chairman expressed the view that the broadcaster was aware of the content of the film and the impact it might have upon a healthy mental or moral development of minors. Therefore, it should be identified by Telewizja Polska S.A. in a different way and transmitted between 11 pm and 6 am.

c. Argumentation of Telewizja Polska S.A.

Telewizja Polska S.A. argued that the *Dog Day* presents a cartoon vision of the world. It also emphasized that due to its high artistic values, the said film could be transmitted even though it contained scenes and content which might have an adverse impact upon a healthy physical, mental, or moral development of minors their transmission.

d. Judgment of 25 November 2002 of the Regional Court in Warsaw, XX GC 589/01[214]

The Regional Court referred in its judgment to Articles 18(4) and 18(5) of the BA, as well as to the Regulation of 1994 of the KRRiT concerning the classification of programmes or other broadcasts. The Court observed that there are no doubts that the film *Dog Day* contains language that is vulgar, insulting, and contemptuous. It also contains scenes of violence and sex. According to the RC, educational role of television is overestimated in both its positive and negative meaning. Standards of behaviour have their source in home and close surrounding. This creates the base for the development of minors. The *Dog Day* watched by teenagers accompanied by their parents can be used to initiate discussion on difficult moral issues. The aim of the film was deeper than cheap entertainment. The film was identified as a programme that may be watched by children with their parents' consent. This means that young viewers should watch this film together with adults whose role is to dispel doubts and answer questions.

e. Judgement of 9 March 2004 of the Supreme Court, III SK 16/04[215]

The Supreme Court referred in its judgment to Articles 18(4) and 18(5) of the BA. It also referred to the Regulation of 2001 Regulation of the KRRiT concerning the classification of

213 Decision No 2/2001 (28 February 2001) of the Chairman of the KRRiT, made available by the Office of the Chairman on 26 November 2015 at my request.
214 The judgment was made available at my request by the RC in Warsaw on 22 December 2015.
215 Legalis No 289031.

programmes or other broadcasts[216] that has no binding force at the moment. The Supreme Court did not even mention it its judgment the issue of the freedom of speech not speaking of the necessity of limiting it in order to protect minors.

The Supreme Court emphasized that Polish law prohibits transmission of programmes and other broadcasts threatening the physical, mental, or moral development of minors. This prohibition is an absolute one, and refers in particular to programmes and other broadcasts that contain pornography or exhibit gratuitous violence (Article 18(4)). As regards other programmes and broadcasts than the above-mentioned that contain scenes or contents which may have an adverse impact upon a healthy physical, mental, or moral development of minors, their transmission is not absolutely prohibited. They may be transmitted, however, in accordance with special conditions. Firstly, such programmes and broadcasts can be transmitted only in the specific period of time that is between 11 pm and 6 am (Article 18(5)). Secondly, the above-mentioned programmes and broadcasts should be specifically identified by broadcasters.

The Supreme Court argued that statutory prohibition of transmitting programmes and other broadcasts that contain scenes or contents which may have adverse impact upon a healthy physical, mental, or moral development of minors is aimed at protecting minors with regard to their age and their legally protected goods. Therefore the programmes and other broadcasts that contain scenes, or contents which may have an adverse impact upon a healthy physical, mental, or moral development of minors, even if it has high artistic values, can be transmitted solely at the time stated in Article 18 (5) of the BA.

iii. Probability of Adverse Impact of a Programme or Broadcast upon a Healthy Mental or Moral Development of Minors—Nakedness and Improper Standards of Behaviour

a. Case Description

In October 2011, TVN S.A. transmitted several parts of a programme called *TOP Model. Zostań modelką*. The convention of this programme is based on selecting candidates to become models. Girls that attend castings to the main programme are selected to the pre-castings and then to another stages of the programme. During one of the castings, one of the girls encouraged one of the members of the jury to touch her breasts in order to check whether or not it is artificial. The member of the jury followed the encouragement, and checked the girl's breasts. During the main programme, 13 girls competed with one another in order to be selected to other parts. Girls who were not selected had to leave to programme. The competition was based on tasks which were different in every part of the programme, and concerned for instance their attendance in the fashion show.

In every part of the programme, a photo session took place, and the photographs were assessed by the jury, and eventually stated a basis for their decision which girls was to be eliminated from the programme. Those photo sessions concerned different subjects. In one of

216 Rozporządzenie Krajowej Rady Radiofonii i Telewizji z dnia 20 listopada 2001 r. w sprawie szczegółowych zasad kwalifikowania, rozpowszechniania i sposobu zapowiadania audycji lub innych przekazów, które mogą zagrażać fizycznemu, psychicznemu lub moralnemu rozwojowi niepełnoletnich, Dz. U. of 2001, No 152, item 1744.

them, every girl had to pose for a photograph with a naked model. In another photo session in turn, every girl had to pose for a photograph wearing only lingerie and naked. During the scenes of the latter session, the breasts of the girls posing for the photographs were visible on TV screen. One girl refused to pose naked for the photograph as a result of which she was later eliminated from the programme.

The programme contained also short interviews with competing girls as well as with their families concerning their attitude to their attendance in the programme, their assessment of the tasks they had to fulfil, and also their desire to become a model.

b. Argumentation of the Chairman of the Council

In the decision of 9 of July 2012,[217] the Chairman of the KRRiT argued that the *TOP Model. Zostań modelką* promoted nakedness and improper standards of behaviour. According to the Chairman, the said programme indicated one aim that should be achieved at all cost which is carrier, success, fame, and money. The Chairman expressed the view that TVN S.A. did not properly identify the programme due to the fact that it was identified as intended for children above the age of twelve while its content was actually intended for older children. The Chairman emphasized that the broadcaster infringed the Regulation of the KRRiT concerning the classification of programmes or other broadcasts and also Article 18(5) of the BA.

c. Argumentation of TVN S.A.

TVN S.A. argued that the programme *TOP Model. Zostań Modelką* did not have content exposing nudity in an overly way. It also admitted that during the programme, breasts of the girls posing for the photographs were visible, however, it also indicated that no other intimate parts of their bodies were shown in the programme. TVN S.A. also argued that it properly identified the programme as intended for children above the age of twelve. The broadcaster expressed the view that the content of the said programme could not be described as not intended for children of the aforementioned age.

d. Judgment of 10 January 2014 of the Regional Court in Warsaw, XX GC 758/12[218]

The Regional Court referred in its judgment to provisions of Article 18(5) of the BA and Paragraphs 2 and 5(3) of the Regulation of the KRRiT concerning the classification of programmes or other broadcasts. The Court emphasized that pursuant to Article 18(5) of the BA, programmes and broadcasts that contain scenes or contents which may have an adverse impact upon a healthy physical, mental or moral development of minors may be transmitted in accordance with special conditions. First of all, such programmes can be transmitted solely between 11 pm and 6 am. The Court also indicated that according to provisions of Paragraphs 2 and 5(3) of the Regulation

217 Decision No 5/2012 (9 July 2012) of the Chairman of the KRRiT.
218 www.orzeczenia.ms.gov.pl.

of the KRRiT concerning the classification of programmes or other broadcasts, they should be properly identified by broadcasters as containing scenes or contents which may have an adverse impact upon healthy physical, mental, or moral development of minors.

The Court focused its deliberations on deciding whether the above-mentioned parts of the programme *TOP Model. Zostań modelką* contained scenes or contents which might have had an adverse impact upon a healthy physical, mental, or moral development of minors above the age of twelve. It did not share the view of the Chairman of the KRRiT. The Regional Court emphasized that the way the nakedness was presented during the programme cannot be assessed as scene or a content which might have had an adverse impact upon a healthy physical, mental, or moral development of minors above the age of twelve. The photographs taken during the session transmitted in the programme were of artistic nature. The Court admitted that breasts of girls attending the session were visible on TV screens, however, they were not presented in vulgar or any other improper way.

The Regional Court observed that behaviour of the member of the jury who touched naked breasts of one of the girls should be assessed as a negative one. However, even such attitude shown in the programme might not have had an adverse impact upon healthy physical, mental, or moral development of minors above the age of twelve. According to the RC, such situation during the whole programme occurred only once.

Also, the RC did not concur with the opinion of the Chairman of the KRRiT that the programme propagated negative standards of behaviour by showing that the only values are success, fame, and popularity at whatever cost. The Court expressed the opinion that the programme presented modelling in the positive way. On the other hand, however, it also shown how much dedication is necessary in order to work as a model. The Regional Court did not refer in its judgment to the freedom of speech. It limited its considerations on the analysis of Article 18(5) of the BA and Paragraphs 2 and 5(3) of the Regulation of the KRRiT concerning the classification of programmes or other broadcasts.

e. Judgment of 9 April 2015 of the Appeal Court in Warsaw, VI ACa 744/14[219]

The CA expressed opposite opinion to that of the RC. It also analysed in its judgment Articles 18(4) and 18(5) of the BA, as well as Paragraphs 2 and 5(3) of the Regulation of the KRRiT concerning the classification of programmes or other broadcasts. The CA, however, reached other conclusions than the RC. It noticed that the programme *TOP Model. Zostań modelką* contained scenes which might have had an adverse impact upon a healthy physical, mental, or moral development of minors above the age of twelve. The CA emphasized that the programme shows that only exceeding limits of someone's embarrassment and privacy, as well as exposing sexuality can lead to achieving the desired aim. Such model of thinking may have in turn devastating effect upon minors. Bearing the above in mind, the CA decided that TVN S.A. infringed provisions of Article 18(5) of the BA and Paragraph 2 of the Regulation of the KRRiT concerning the classification of programmes or other broadcasts. The CA argued that the *TOP Model. Zostań modelką* should not be identified as available to children above the age of twelve.

219 http://www.orzeczenia.ms.gov.pl/details/$N/154500000003003_VI_ACa_000744_2014_Uz_2015-04-23_001.

The CA did not refer in its judgment to the freedom of speech. It limited its considerations on the analysis of Article 18(5) of the BA and Paragraphs 2 and 5(3) of the Regulation of the KRRiT concerning the classification of programmes or other broadcasts.

iv. Probability of Adverse Impact of a Programme or Broadcast upon a Healthy Mental or Moral Development of Minors—Arousing Negative Emotions. Scene 1

a. Case Description

Telewizja Polsat S.A. transmitted a several parts of the programme *Fear Factor. Nieustraszeni*. The transmission took place in October and November 2004, between 9 and 10 pm. The convention of the programme was based on competition of contestants who were required to fulfil special tasks different in every part of the programme. All of them competed for their participation in the final of the programme in Argentina and a prize money. As it has already been mentioned, every participant had to fulfil the task otherwise she/he was eliminated from the programme. Thus, for instance, they had to eat raw pig's organs mixed with pig's blood, eat sheep's eyes, spilling onto their naked bodies (including face and head) snakes, larva, and insects, colleting flags from the roof of rushing bus.

b. Argumentation of the Chairman of the Council

In the decision of 29 December 2004,[220] the Chairman of KRRiT argued that transmission of a programme infringed Article 18(5) of the BA. According to the Chairman, the content of the programme might have had an adverse impact upon healthy physical, mental, or moral development of minors. The Chairman observed that the programme in question contained very dangerous manipulation that leads to turning certain values back. Thus, it leads to the conclusion that executing tasks shown in *Fear Factor. Nieustraszeni* positive values such as sensitivity are denied while behaviours that are senseless, repugnant, or even stupid are presented in the positive light as exemplary. The Chairman expressed the opinion that presenting values in such a way is especially dangerous for proper development of minors whose system of values is not properly and fully shaped yet. Moreover, they do not have the possibility of critical assessment of presented values. With regard to the above, the Chairman noticed that minors may try to imitate behaviours presented in the programme *Fear Factor. Nieustraszeni* in the aura of heroism.

c. Judgement of 10 June 2008 of the Appeal Court in Warsaw, VI ACa 1555/07[221]

The CA focused in its judgment on the analysis of Article 18(5) of the BA. It emphasized that pursuant to Article 18(5) of the BA, programmes and broadcasts that contain scenes

220 Decision No 13/2004 (29 December 2004) of the Chairman of the KRRiT, made available by the Chairman on 1 December 2015 at my request.

221 http://www.orzeczenia.ms.gov.pl/details/$N/154500000003003_VI_ACa_001555_2007_Uz_2008-06-10_001.

or contents which may have an adverse impact upon healthy physical, mental, or moral development of minors may be transmitted in accordance with special conditions. First of all, such programmes can be transmitted solely between 11 pm and 6 am. Having the above in mind, the CA merely analysed whether the programme *Fear Factor. Nieustraszeni* might have had an adverse impact upon healthy physical, mental, or moral development of minors.

The CA expressed the view that the tasks which people participating in the programme were supposed to fulfil might have had an adverse impact upon healthy physical, mental, or moral development of minors by arousing emotions and feelings such as disgust, embarrassment, or fear. Such emotions and feelings in case of minors can lead to annoyance, impulsiveness, or even aggression. The CA referred also to the part of the programme in which participants had to eat sheep's eyes. This part was preceded by a scene showing sheep with blindfold, and the comment that the worst had just happened. The CA also argued that the fact that the programme *Fear Factor. Nieustraszeni* is a reality show made the adverse effect upon the healthy development of minors much stronger than a fiction. The CA did not mention in its judgment the problem of limiting the freedom of speech in order to protect minors.

v. Probability of Adverse Impact of a Programme or Broadcast upon a Healthy Mental or Moral Development of Minors—Arousing Negative Emotions. Scene 2

a. Case Description

On 24 February 2006, Telewizja Polsat S.A. transmitted the programme *Fear Factor. Nieustraszeni*. The transmission took place at 21:35. The broadcaster identified this programme as addressed to viewers above the age of sixteen. During the programme, young people compete for the title of Fearless Champion. In four contests, they compete for prizes that is a certain amount of money and a luxury car. In one of the contests, competing people had to eat, eg, mixed insects, badly smelling eggs, wormy cheese. In another contest, the competitors had to swim in a container filled with water and dead mouse—their task was to carry the carcases in the mouth, and putting them into the separate container.

b. The argumentation of the Chairman of the Council

In the decision of 22 March 2006,[222] the Chairman of the KRRiT adjudicated that Polsat S.A. infringed Articles 18(1)–(5)b of the BA and Paragraphs 2 and 3 of the Regulation of 2005 of the KRRiT concerning the classification of programmes or other broadcasts. The Chairman observed that by transmitting the programme *Fear Factor. Nieustraszeni,* Polsat S.A. infringed Articles 18(5) and 18(5)b of the BA. It was transmitted at 21:35 that is at the time which is called protected by the BA. Furthermore, this programme was improperly identified as available for minors above the age of sixteen. According to the Chairman, the content of the said programme may have an adverse impact upon the healthy physical, mental, or

222 Decision No 3/2006 (22 March 2006) of the Chairman of the KRRiT, made available by the Office of the Chairman on 17 December 2015 at my request.

moral development of minors. The programme contains scenes in which people do revolting things in order to win the contest and the prize. Furthermore, persons doing this things are presented in the aura of heroism which in turn may lead to developing flawed hierarchy of values. There is one aim indicated in the programme *Fear Factor. Nieustraszeni*—one is able to do everything, even the most humiliating, in order to win money and luxury car. Pursuant to the provisions of the Regulation of 2005 of the KRRiT concerning the classification of programmes or other broadcasts, content described above should not be addressed to minors at the age of 16–18. By identifying the programme as available for minors above the age of sixteen, the broadcaster also infringed the provisions mentioned above.

c. Judgment of 12 March 2008 of the Regional Court in Warsaw, XX GC 635/06[223]

The Regional Court expressed opinion that the programme may arise disgust and doubts at its aesthetical values. According to the RC, transmission of this programme did not infringe either the provisions of Article 18 of the BA or the Regulation of 2005 of the KRRiT concerning the classification of programmes or other broadcasts. The *Fear Factor. Nieustraszeni* was properly identified as attended for minors above the age of sixteen. The Court confined its judgment to the very limited analysis of Article 18 of the BA and the Regulation of 2005 of the KRRiT concerning the classification of programmes or other broadcasts. It did not refer to the problem of freedom of speech and the necessity of its limitation.

d. Judgment of 29 December 2008 of the Appeal Court in Warsaw, VI ACa 797/08[224]

The Chairman of the KRRiT appealed against the judgment of the RC of 12 March 2008. The CA analysed the appeal, and judged that the RC had not examined the substance of the case. The CA observed that the examination on whether or not certain programme or other broadcast infringes Article 18 of the BA should be based on the analysis of the whole content of the programme or broadcast. It cannot be limited to its part. Moreover, as the CA noticed, the RC, examining the case, is obligated to determine whether Article 18 of the BA was infringed in the light of objective social norms and values. Therefore the RC was obligated to analyse the content of the programme. In other words, the programme should be watched by the RC then analysed its content in the light of Article 18 of the BA.

e. Judgment of 24 January 2011 of the Regional Court in Warsaw, XX GC 78/09[225]

The Regional Court started the legal analysis of the case from a reference to Article 54(1) of the Constitution that declares the freedom to express opinions as well as the freedom to acquire and disseminate information. The Court referred also to Article 14 of the Constitution

223 http://www.orzeczenia.ms.gov.pl/details/$N/154505000006027_XX_GC_000635_2006_Uz_2008-03-12_001.
224 www.orzeczenia.ms.gov.pl.
225 http://www.orzeczenia.ms.gov.pl/details/$N/154505000006027_XX_GC_000078_2009_Uz_2011-01-24_001.

that states the freedom of the press and other means of social communications. Also, the RC emphasized that although special importance was assigned to the freedom of speech in Polish law, Article 31(1) of the Constitution provides for the possibility of imposing limits on its exercise. Pursuant to Article 31(1) of the Constitution, limitations on free speech are provided for in Article 18 of the BA. The Court observed that it is necessary to analyse orders and prohibitions stated in Article 18 of the BA in the light of the constitutional provisions stating the freedom of speech. The judgment did not contain any reference to the ECHR or any other international regulations relating to the freedom of speech.

The Regional Court indicated that pursuant to Article 18(5) of the BA, programmes and broadcasts that contain scenes which may have an adverse impact upon a healthy physical, mental, or moral development of minors may be transmitted in accordance with special conditions. Therefore such programmes can be transmitted solely between 11 pm and 6 am, and should be properly identified by the broadcaster.

The Regional Court expressed opinion that during the programme *Fear Factory. Nieustraszeni*, competitors were forced to accept rules that arousing their fear, resistance, or internal conflict in order to achieve a positive opinion of a group and financial success. Following their own moral values and feelings would cause negative reaction of their group, and losing the competition. In the opinion of the RC, propagation of such values and standards of behaviour might have had an adverse impact upon a healthy physical, mental, or moral development of minors.

vi. Probability of Adverse Impact of a Programme or Broadcast upon a Healthy, Mental, or Moral Development of Minors—Vulgarity, Violence, and Improper Standards of Behaviour. Scene 1

a. Case Description

In 2012, TVN transmitted the series of the programme *Rozmowy w toku* ('Po co talent, po co szkoła – ja pozować będę goła!' on 30 March at 15:55; 'Jak imprezuje ćpunka z gimnazjum?' on 6 April at 15:55; 'Na randkach spotykam samych zboczeńców' on 16 May at 15:55; 'Popatrz na mnie! Widzisz przed sobą pustaka?' on 17 July at 16:30). During the 'Po co talent, po co szkoła – ja pozować będę goła!' ('What the talent and school for if I will pose naked?'), the girls attending the programme spoke about their dreams to pose naked and their motivation to do so.In the 'Jak imprezuje ćpunka z gimnazjum?' ('How the junkie from secondary school parties?'), young girls who are addicted from drugs tell their stories. Their relations were exceptionally drastic, and contained a lot of vulgarisms. As regards the 'Na randkach spotykam samych zboczeńców' ('I meet only pervert at dates'), during this programme, the girls invited to the TV studio spoke about sexual aspects of their dates. During the 'Popatrz na mnie! Widzisz przed sobą pustaka?' ('Look at me! Do you see empty-headed girl?'), girls invited to the TV studio spoke about the way they beat other people.

b. Argumentation of TVN S.A.

TVN S.A. argued that the episodes in question did not infringe Article 18(5) of the BA. It emphasized that opinions expressed by girls participating in the programme were criticized by experts who also participated in the *Rozmowy w toku*. The expert was usually a psychologist. Also the host of the programme critically assessed the behaviours presented by the girls. Thus, the programme in question can be identified as available for children at the age of twelve.

c. Argumentation of the Chairman of the Council

In the decision of 27 March 2013,[226] the Chairman of the KRRiT argued that the content of the episodes is especially harmful for minors. Such programmes should not be transmitted in the afternoon, and be identified as available for minors above the age of twelve. According to the Chairman, the broadcaster infringed Article 18(5) of the BA and the Regulation of 2005 of the KRRiT concerning the classification of programmes or other broadcasts. As regards the episode 'Po co talent, po co szkoła, jak pozować będę goła!', the Chairman observed that for children at the age of twelve the vision of fame and prosperity being the result of posing naked may appear as being very attractive. Minors at this age are not able to assess critically negative sites of behaviours of the girls participating in the programme.According to the Chairman, the programme 'Jak imprezuje ćpunka z gimnazjum?' had a content that from the perspective of minor at the age of twelve may be shocking, incomprehensible, and impossible for being classified to well-known category of human behaviours. The Chairman expressed the opinion that the content of the 'Na randkach spotykam samych zboczeńców' was of highly drastic nature, presented in a very primitive and vulgar language. The programme in question presented negative standards of behaviour which in turn may influence the way the minors at the age of twelve perceive human relations. With regard to the 'Popatrz na mnie! Widzisz przed sobą pustaka?', the Chairman decided that it contains descriptions of very brutal behaviours. Moreover, such behaviours are presented as the only way of living of girls invited to the studio, and their way of achieving certain aims. According to the Chairman, attitudes presented during the programme constitute very negative standards of behaviour.

The Chairman emphasized that the time of transmitting the aforementioned programmes is a time when minors watch TV often without attendance of adults. Therefore, they are exposed to receiving the content that is actually not intended for minors at the age of twelve. Furthermore, they receive such content that is not even provided with a commentary of an adult that could help them to properly understand it.

d. Judgment of 23 November 2015 of the Regional Court in Warsaw, XX GC 531/13[227]

The Regional Court concurred with the opinion expressed by the Chairman of the KRRiT. The Court observed that the programme *Rozmowy w toku* had a content that is

226 Decision No 2/2013 (27 March 2013) of the Chairman of the KRRiT, made available by the Office of the Chairman on 1 December 2015 at my request.

227 Judgment was made available by the RC on 3 December 2015 at my request.

not appropriate for a twelve year old child. The models of behaviours presented by girls are not appropriate, and should not be promoted in the programmes addressed to minors at the age of twelve. Also the language presented in this programme was not a proper one for children at this age. According to the RC, the programme in question also presented the view that was not real for normally living people. The programme *Rozmowy w toku* is an example of the light entertainment that is based on other peoples' exhibitionism, someone's life helplessness or tendency to use life without taking into account the consequences. Such programme has no educational values due to the fact that time devoted to the expert's comment is not proportional to the interviews with the guests invited to the studio. Therefore, it was doubtful whether it could fulfil preventive role. The Court emphasized that the programme in question sometimes concerned important problems that should be discussed in order to warn minors and their parents. However, way of presenting such problems was aimed at exposing sensational character of other peoples' relations and it lacked a proper commentary.

Bearing the above in mind, the RC assessed the programme *Rozmowy w toku* as containing a content that might have had an adverse impact upon a healthy physical, mental, or moral development of minors may be transmitted in accordance with special conditions. Therefore such programmes can be transmitted solely between 11 pm and 6 am and should be properly identified by the broadcaster which did not occur in this case. The Court analysed in its judgment the provisions of the BA. It did not refer to provisions stating the freedom of speech. It only referred to the SC judgments in which the freedom of speech was analysed.

vii. Probability of Adverse Impact of a Programme or Broadcast upon a Healthy Mental or Moral Development of Minors—Vulgarity and Improper Standards of Behaviour. Scene 2

a. Case Description

On 4 October 2010 at 15:55, TVN S.A. transmitted an episode of the programme *Rozmowy w toku*, 'Najlepsza na świecie jest miłość w klozecie'. The programme was identified as available for minors above the age of twelve. The idea of this programme consisted of conversation with young girls invited to the TV studio who spoke about their sexual life. The conversation was held by the host of the programme, and was commented by an expert, a psychologist. Also audience was invited to the TV studio who reacted to some aspects of conversation, eg, by laughing. The sexual life the girls invited to the studio spoke about was untypical that occurring in strange places and involving casual partners. All girls invited to the studio, although very young, were sexually quite experienced. They all emphasized that they are not interested in stable relationship, and for them, sex with casual partners means fun.

b. Argumentation of the Chairman of the Council

In the decision of 11 March 2011,[228] the Chairman of the KRRiT argued that the programme 'Najlepsza na świecie jest miłość w klozecie' had content that may have an adverse impact upon a healthy physical, mental, or moral development of minors. Therefore the aforementioned programme may be transmitted in accordance with special conditions. Thus it can be transmitted solely between 11 pm and 6 am and should be properly identified by the broadcaster. The picture of sexual life of young people presented in the programme is contradictory to morality. It was presented in the way that was attractive to minors who may have watched this programme. As such, it could encourage them to similar behaviour. Moreover, the stories presented in the programme could reinforce the conviction that they did not take place at the margin of social life.

The Chairman emphasized also that opinions expressing criticism towards such sexual behaviours and attempts to discover the reasons for such behaviours were so rare in the programme that they almost disappeared between sensational stories of the aforementioned young girls and the laugh of the public. Therefore, they were not able to minimize an adverse impact upon healthy physical, mental, or moral development of minors.

Bearing the above in mind, the Chairman decided that TVN S.A. infringed Article 18(5) of the BA and the Regulation of 2005 of the KRRiT concerning the classification of programmes or other broadcasts.

c. Argumentation of TNV S.A.

TVN S.A. argued that the programme 'Najlepsza na świecie jest miłość w klozecie' was aimed at discussing the sexual life of young people. It was not aimed at propagating behaviours that are contradictory to morality.

d. Judgment of 10 September 2013 of the Appeal Court in Warsaw, I ACa 418/13[229]

The CA expressed opinion that the programme 'Najlepsza na świecie jest miłość w klozecie' was not properly identified as intended for minors above the age of twelve. Furthermore, according to the CA the said programme should not be identified as addressed for minors above the age of sixteen. Bearing the above in mind, the CA observed that the broadcaster infringed Article 18(5) of the BA and Regulation of 2005 of the KRRiT concerning the classification of programmes or other broadcasts. Minors younger than 18 years of age should not watch programmes that present perverted forms of social relations. The CA emphasized that the programme 'Najlepsza na świecie jest miłość w klozecie' had no educational values due to the fact that opinions of experts expressed during the show were faint and unconvincing.

228 Decision No 1/2011 (11 March 2011) of the Chairman of the KRRiT, made available by the Office of the Chairman on 17 December 2015 at my request.

229 http://www.orzeczenia.ms.gov.pl/details/$N/154500000000503_I_ACa_000418_2013_Uz_2013-09-10_001.

The judgment of the CA did not contain analysis of provisions concerning the freedom of speech. The CA merely mentioned that there is no legal basis to apply Article 54(1) of the Constitution as well as Article 10(1) of ECHR.

viii. Commercial Communications Prejudicing Physical, Mental, or Moral Development of Minors, and Probability of Adverse Impact of a Programme or Broadcast upon a Healthy Mental or Moral Development of Minors—Improper Standards of Behaviour

a. Case Description

On 7, 8, and 9 September 2012, Telestar S.A. transmitted telesales containing scenes of naturalistic sex. The commercial concerned pornographic movies that could be bought by sending message to a given telephone number. It was identified as available for adults that is for persons above the age of eighteen.

Also Telestar S.A. transmitted the following programmes: Disko Budzik, DJ Mix Show, ITV Hits, Disko Stacja, Disco Polo Show, Disco Tour, Koncert Życzen. These programmes were transmitted before 8 pm, and were identified as available for children above the age of twelve. They contained video clips, eg, 'Pokaż jak się kręcisz' ('Show Me how You Whirl'); 'Made in Poland'; 'Sexy lala' ('Sexy Doll); 'Aga jest naga' ('Aga is Naked'); 'Wypijmy więc' ('Let's Drink'); 'Złodzieje serc' ('Thieves of Hearts'); 'Mam kaca' ('I Have a Hangover'); 'Powiedz co się kręci' ('Tell Me What Turns You on'); 'Urodziny u Haliny' ('Brithday at Halina's'); 'Trzęś tyłkiem' ('Shake Your Butt'); 'Tutti Frutti'; 'Chodź bliżej' ('Come Closer'); 'Impreza' ('A Party'); 'Ogień ciał' ('Fire of Bodies').

b. Argumentation of the Chairman of the Council

In the decision of 8 July 2013,[230] the Chairman of the KRRiT observed that the infringement of Article 16(3)4 of the BA was not incidental, rather the opposite, the aforementioned commercial was transmitted for three days for four hours every day. Therefore, this infringement was persistent. According to the Chairman, although the commercial containing pornography was transmitted between 11 pm and 6 am, and was identified as available for adults, it was of adverse impact upon minors, and it infringed Article 16(3) point 4 of the BA regardless of the time of its transmission.

As regards the video clips listed above, the Chairman expressed opinion that they contained scenes encouraging to make sex, to treat sexual partners like objects. Their content was also aimed at exposing sexuality of women presented as objects. Additionally, these video clips demonstrated wrong patterns of behaviours, and contained vulgar language and gestures. They also encouraged to drink alcohol and use drugs. The Chairman also noticed that some of these video clips presented simplified vision of adulthood by showing that it consists only of drinking, partying, gambling, and having sex without any consequences.

230 Decision No 3/2013 (8 July 2013) of the Chairman of the KRRiT, http://www.krrit.gov.pl/Data/Files/iwojciechowska/telestar---decyzja-nr-3_2013-z-8.07.2013.pdf.

According to the Chairman, such scenes should not be watched by minors under the age of twelve due to the fact that they cannot be properly understood and assessed, taking into account the level of the minors' emotional, intellectual, moral, and social maturity.

Bearing the above in mind, the Chairman expressed opinion that the video clips listed above should be identified by broadcaster as available for minors above the age of sixteen. The Chairman also observed that proper identification of programmes is highly important for parents who can control what kind of programmes are watched by their children. Improper identification of such programmes exposes minors to harmful content that in turn may have negative impact on their emotional, intellectual, moral, and social development.

ix. Transmission of a Programme Threatening the Physical, Mental, and Moral Development of Minors—Pornography

a. Case Description

On 26 August 2013 at 23:15, TVN Style transmitted a film *Siła pożądania* (originally titled as *Cabaret Desire*). The leitmotiv of the film is a story of four women. Each story is based on showing sexual experience of one woman. Scenes containing sex are shown in a very realistic, precise, and indirect way. It is worth adding that the film in question did receive award at the festival of pornographic films in Toronto.

b. Argumentation of the Chairman of the Council

In the decision of 11 March 2014,[231] the Chairman of the KRRiT decided that TVN Style infringed Article 18(4) of the BA. The Chairman noticed that the fact that the film was transmitted at 11 pm and was identified as available only for adults does not mean that the broadcaster complied with the provisions of the BA. According to the Chairman, there are no doubts that the film *Siła pożądania* contains pornography. Therefore, it should not be transmitted at all due to the provisions of Article 18 (4) of the BA that prohibits transmission of programmes and other broadcasts threatening the physical, mental, and moral development of minors. This prohibition is an absolute one, and refers in particular to programmes and other broadcasts that contain pornography or exhibit gratuitous violence (Article 18(4)).

c. Argumentation of TVN

The broadcaster argued that the programme TVN Style is based on demonstrating various trends of global TV production. The *Siła pożązdania* directed by Erika Lust presents modern erotic film for women. The film was transmitted after 11 pm, and was identified as only for adults. Therefore the viewers were cautioned that the film should not be watched by children. Also the title of the film explicitly indicates its content. The broadcaster also argued that works of Erika Lust is

231 Decision No 1/2014 (11 March 2014) of the Chairman of the KRRiT, http://www.krrit.gov.pl/Data/Files/_public/Portals/0/wiadomosci/decyzja-1_2014.pdf .

appreciated by viewers. Furthermore, according to the broadcaster, the film does not infringe Article 18 (4) of the BA due to the fact that it does not contain pornography. The broadcaster observed that the notion of pornography is vague and open to many different interpretations. In the case of the *Siła pożądania* one cannot speak of pornography but rather of work of art.

d. Judgment of 11 August 2015 of the Regional Court in Warsaw, XX GC 1052/14[232]

The Regional Court concurred with the opinion of the Chairman of the KRRiT. It referred in its judgement to provisions stating the freedom of speech, ie, to Articles 14 and 54(1) of the Constitution as well as to Article 10 of the ECHR. The Court also referred to provisions that concern the limits of the freedom of speech. It observed that such limits in Polish legal system were introduced in Article 72(1) of the Constitution and in Articles 18(4) and 18(5) of the BA. The Court expressed opinion that the *Siła pożądania* contains pornography and as such should not be watched by minors.

XII. Right of Reply

The BA does not contain any specific provisions pertaining to the right of reply. In its Article 3 the BA provides that unless it is otherwise provided in provisions, the provisions of the press law apply to the transmission of radio and television programme services. The broadcaster's activity consisting in producing and organizing programme services should be carried out in the form of editorial activity as defined in the press law (Article 19(1)).

The Press Law (PL)[233] does not contain any provisions pertaining to the right of reply. Provisions regulating the right of reply were deleted from the PL in the Amendment of 2 November 2012. The currently biding PL contains provisions regulating the right to a disclaimer;[234] according to Article 31a(1), this right can be exercised by natural person, legal person, and organizational units. Upon their request, the editor-in-chief has an obligation to publish the disclaimer free of charge. The disclaimer should be a matter of fact,[235] should relate to facts[236] and should pertain

232 http://www.orzeczenia.ms.gov.pl/details/$N/154505000006027_XX_GC_001052_2014_Uz_2015-08-11_001.

233 Ustawa z dnia 26 stycznia 1984 r. Prawo prasowe, Dz.U. 1984, Nr 5 poz. 24.

234 M Siwiec and D Wszołek-Lech, 'Konstytucyjne podstawy odpowiedzialności karnej za umieszczenie sprostowania wbrew warunkom art. 32 ust. 5 PrPras - komentarz do P 2/03' *Monitor Prawniczy* 4 (2007) 2.

235 A matter of fact means that the disclaimer should contain the content that is concrete, coherent, and clear. The disclaimer cannot relate to all circumstances that the interested person associates with the situation described in the publication. The disclaimer should be focused on correcting information that is false or unclear, as well as statements that constitute threat for the interested person's personal goods. Judgment of 28 May 2015 of the AC in Warsaw, VI ACa 356/15, LEX 1814845.

236 The disclaimer mentioned in Article 31a of the PL pertains to false information but also to inaccurate information when certain fragments of publication analysed separately from its other fragments cannot be regarded as being false, however, presented as a whole, in certain configuration transmit inaccurate information. The disclaimer can concern the contorted version of events, but has to pass over information that is important for assessing whether the published information is true and accurate. The AC in Warsaw also argues that the fact in the meaning of the provisions of Article 31a of the PL is possessing by the interested person certain (specified) opinions, views, reflections, conceptions due to the fact that the aforementioned provisions mention the event in the broad sense. Judgment of 3 of July 2014 of the AC, I ACa 638/14, LEX 1496124.

to information that is inaccurate or false.[237] The disclaimer is defined as a specific form of a statement of certain subject that is interested in the content of published information.[238] Such subject in turn is everyone whom the published information concerns that is has effect on the assessment of his/her/its behaviour, status, position in the society.[239]

Representatives of the legal doctrine emphasize that the right to a disclaimer is an institution of a civil material law, a relation of obligation within which the subject interested in publishing the disclaimer is a creditor, while an editor-in-chief is a debtor.[240] The obligation to publish the disclaimer does not constitute the responsibility for infringing the law. This means that there is the obligation to publish the disclaimer not because the journalist infringed the law, but due to the fact that the material containing information contested by interested subject was published.[241]

The disclaimer is always own statement of subject interested in its publishing.[242] It cannot be replaced by other statements, eg, by the statement of journalist, publishing it as a letter or an interview. The disclaimer should be limited to facts which means that it should not have any evaluative judgments of occurring certain fact. The aim of publishing the disclaimer is presenting own, subjective stand of the interested person on published facts.[243]

As it has already been mentioned, the editor-in-chief is obligated to publish the disclaimer in the closest analogous programme, however, the parties can agree other date for publishing the disclaimer (Articles 32(1)–(3)). Publication of the disclaimer in the programme should be clearly announced, take place in the programme of the same kind, and at the same time of the day (Article 32(4)).

The PL provides for the catalogue of reasons on the basis of which the disclaimer cannot be published. The editor-in-chief is obligated to refuse to publish the disclaimer if, eg, it is not the matter of fact or does not relates to facts; it was provided after the time limits specified in the PL; it contains criminal content (Article 33(1)). Besides, the editor-in-chief is entitled to refuse to publish the disclaimer if, eg, it pertains to information that was already rectified or contains vulgar or insulting language (Article 33(2)). Once the editor-in-chief decides to refuse to publish the disclaimer, he/she is obligated to inform the applicant in a written form

237 The legislator distinguishes the notions of real information and honest information. The notion of real (true) information one should understand information that accurately reflects reported state of facts. Such information is the opposite of the false information. The honest information should mean information that is checked or verified in the conditions of the availability of reliable source of information, that is the information that was acquired and published by the person acting with due diligence. Publication of honest information cannot guarantee that only real information is published. Therefore the provisions of the PL regulate the right to the disclaimer that is aimed at deleting consequences of publishing false information. The AC in Warsaw indicates that the editor-in-chief is not entitled to publish a disclaimer subject to results of objective examination aimed at determining whether certain publication indeed contained false or inaccurate information. Judgment of the AC in Warsaw of 18 June 2014, VI ACa 1467/14, LEX 1493910.

238 W Lis, P Wiśniewski, Z Husak (eds), *Prawo prasowe. Komentarz* (Warszawa, CH Beck, 2012) 473.

239 ibid, 473. See also the judgment of the AC in Warsaw of 27 1998, I ACa 255/98, LEX 62595.

240 P Kosmaty, 'Prawo do sprostowania' *Prokurator* 1–4 (2012) 28.

241 Lis, Wiśniewski, Husak, *Prawo* (n 238) 483.

242 J Barta, R Markiewicz, A Matlak (eds), *Prawo mediów* (Warszawa, LexisNexis, 2008) 387; judgment of 13 August 2015 of the AC in Warsaw, VI/ACa 763/15, LEX 1808816.

243 Lis, Wiśniewski, Husak, *Prawo* (n 238) 480. The disclaimer is aimed at enabling the interested person to present own version of events. This results in the principle that such person is entitled to present the public opinion how certain facts are received by him or her. Therefore, it is justified to say that the disclaimer serves as tool enabling the interested person to present his or her subjective point of view.Judgment of 24 of June 2009 of the AC in Poznań, I ACa 383/09, LEX 756568.

that the disclaimer will not be published, giving the reasons for the refusal (Article 33(3)). It should also be mentioned that the applicant can correct the disclaimer in accordance with the notice sent by the editor-in-chief (Article 33(4)).

The aforementioned rights and obligations of the editor-in-chief relating to the refusal of publishing the disclaimer are connected with his/her responsibility in the light of the provisions of the PL. It should be emphasized that the editor-in-chief has a right to publish the disclaimer that does not pertain to the facts. Such publication does not effect in the editor-in-chief's legal responsibility.[244] However, the editor-in-chief is legally responsible for publishing the disclaimer that contains criminal content or infringes personal goods of other persons.[245]

It should be indicated that the interested person has a right to have the disclaimer published which means that in the light of Polish civil law, such person has a claim for its publishing. It means that if the disclaimer is not published the interested person can bring an action for publishing it (Article 39). The action for publishing the disclaimer should be heard by the RC of the residence of the editorial office whose editor-in-chief was obligated to publish the disclaimer (Article 52(1)). The defendant in such a case is an editor-in-chief who is certainly a natural person. The proceeding before the RC is governed by the provisions of the CCP and PL. The judgment of the RC concerning publication of the disclaimer is limited only to ordering its publication. The representatives of the legal doctrine argue that the RC should examine the content and form of the disclaimer only in order to assess whether or not it is adequate to the relation between parties.[246] The Regional Court should in the first place examine whether there are any conditions listed in the Articles 33(1) and 33(2) of the PL that would justify the refusal to publish the disclaimer. The commentators of the PL emphasize that there is no legal basis for the RC to examine the objective truthfulness of the disclaimer or accuracy of journalistic meticulosity. The Regional Court should neither examine intentions of the disclaimer's author nor the author of the text that is to be rectified. The subject of the examination is the objective content and the meaning of the statement. The disclaimer should pertain to the text that was published, and it is of no importance in such cases whether the final effect of such publication was aimed by its author, or whether the publication was properly understood by the interested person (author of the disclaimer). The judgment should contain the text of the disclaimer the publication of which was adjudicated by the RC. Due to the fact that Polish legal system contains very specific regulations as regards the disclaimer, there are no decisions of the Chairman of the KRRiT or judgments of the RC issued at the result of the appeal against the decision of the Chairman.

244 The AC in Poznań argued that neither the editor-in-chief nor the court has a power to examine whether the publication that is to be corrected is real or accurate. Also, neither the editor-in-chief nor the court is competent to examine whether the disclaimer is real or accurate. The AC in Poznań emphasized that pursuant to Articles 31(1) and 33 of the PL, it does not justify opinion that the editor-in-chief can act as an arbiter adjudicating the question of truthfulness or accuracy of the publication or the disclaimer. The editor-in-chief in turn can only limit the examination to the analysis of the conditions justifying the refusal of publishing the disclaimer. In case of bringing the action for publishing the disclaimer by the interested person to the court pursuant to Article 39 of the PL, the latter is empowered to examine solely conditions listed in the aforementioned provisions. If the editor-in-chief refused to publish the disclaimer, the court may examine whether there were justified reasons for such a decision. Judgment of 24 June 2009 of the AC in Poznań, I ACa 393/09, LEX 756568.

245 Lis, Wiśniewski, Husak, *Prawo* (n 238) 509.

246 K Skubisz-Kępka, *Sprostowanie i odpowiedź w prasie* (Warszawa, LEX, 2009) 295.

Hungary

Szabina Berkényi

I. Definition of the Subject Matter

The aim of this paper is to present the Hungarian media law provisions that restrict the freedom of the press, and—analysing certain specific legal cases, primarily those affecting broadcasting—to provide a comprehensive picture on the application of these provisions. The media law provisions restricting the freedom of the press are typically implemented to protect other fundamental or human rights or, through them, the state protects certain institutions. These can be classified into six main groups, and will be assessed in six main chapters of this paper: (i) protection of human dignity; (ii) hate speech; (iii) balanced coverage; (iv) commercial communications; (v) protection of minors; (vi) right of correction (press remedy).

The chapters dealing with the restrictive rules will first unfold the constitutional foundations of the concerned provision, then the legal background of the restrictions will be described, finally and in most detail, the way the given rule is applied in practice will be demonstrated by detailing specific legal cases. For the purpose of presenting the application of the concerned rules, I examined the consistency of application, both within and between the different decision-making forums (authorities and courts); furthermore, I also assessed any possible changes taking place in application of the rules over time, such as regarding interpretation or competence. The international references made by the parties applying the law have been highlighted, including the references to international conventions, treaties and also to the practice of international law enforcement forums.

To fully understand and systematize the rules restricting the freedom of the press and the related case law, this paper is going to present the Hungarian legal system (both the sources of law and the judicial system), briefly introduce the currently effective media regulations, including the major (procedural) rules to be complied with by the legislators as well. However, first and foremost, the nature of the freedom of the press and the major rules governing its potential restriction should be dealt with.

According to the interpretation applied by the Hungarian Constitutional Court (CC), the fundamental right of the freedom of the press can be deduced from the right of the freedom of expression. The freedom of expression and the freedom of the press—declared under the Fundamental Law[1] (formerly as: Constitution; FL)[2]—have been interpreted by the CC in many decisions. There is a consistent trend in these decisions in emphasising that these civil liberties constitute the fundamental values of a pluralistic and democratic society. The freedom of expression has a special, prominent place among constitutional fundamental rights; in effect it is the 'mother right' of the communicational fundamental rights that guarantee the well-founded participation of the individual in the social and political processes. The right to freely express ideas and views represents the precondition of a democratic society (CC decision No 30/1992. (V. 26.) AB).

The jurisprudence of the CC shows that the justification of the freedom of expression is twofold, the freedom of expression serves both individual autonomy and, for the community, the possibility of creating and maintaining a democratic public opinion. Thus, on the one hand, it guarantees and protects free individual and social communication, regardless of its content. On the other hand, and in addition to the protection of the freedom of expression as

1 Fundamental Law of Hungary (25 April 2011), effective from 1 January 2012.
2 Act XX of 1949, Constitution of the Republic of Hungary, effective until 31 December 2011.

a subjective individual right, the state is also obliged to protect the institutional background of this freedom, since it is the duty of the state to secure the conditions for the creation and maintenance of a democratic public opinion. The state—in the course of providing objective protection to fundamental rights—is to consider the individual values associated with a fundamental right in the context of all other fundamental rights, and shall embed the protection of fundamental rights into the overall protection of the constitutional order (64/1991. (XII. 17.) AB).

Since the CC classified the freedom of expression as a communicational 'mother right', with this, it has also set a predetermined course for all the other communicational fundamental rights, eg, the content of the freedom of the press, the subjective rights deduced from the fundamental rights, and the obligations originating from these. The Constitutional Court pointed out that the freedom of expression is enforced in a special manner regarding the freedom of the press; the distinguished role of the freedom of expression applies to the freedom of the press insofar as it serves the fundamental right of the freedom of expression as laid down in the Constitution. If the freedom of the press serves the freedom of expression, its protection is twofold as well: Besides its nature as a subjective right, it also serves the establishment and maintenance of democratic public opinion. In guaranteeing the freedom of the press, the state has to take into account that the 'press' is an exceptionally important vehicle for accessing information and expressing and formulating opinions. Hence, the press is not only a vehicle of the freedom of expression but also of information, ie, it has a fundamental role in accessing information, which is a precondition to the formulation of opinions (37/1992. (VI. 10.) AB).

Press is the institution of freedom of speech. According to the CC interpretation, freedom of the press includes the freedom of all media. Freedom of the press reinforces the impact of individual expression of opinion and facilitates the provision of information to the democratic public on issues of public interest and the shaping of their opinion on issues of public interest. Hence, the rights holder of this fundamental right, by exercising their right to the freedom of the press, pro-actively shapes democratic public opinion. The press checks and monitors the activities of the participants and institutions of public affairs, the decision-making process, and informs the political community and the democratic general public about these activities, thereby acting as a 'watchdog'. The functioning of the free press and democracy are concepts based on each other: Only individuals positioned in a decision-making situation are able to give adequate response to questions of public interest, and in the creation of decision-making situations the free press plays a key role.

The shaping and operation of a public opinion capable of making democratic decisions may justify interventions on the part of the state beyond the protection of institutions and mere provision of the framework, however, restriction of free expression and freedom of the press require extremely prudent, cautious and justified legislation. According to the CC interpretation, it does not follow from this privileged status of the freedom of expression that this right—similarly to the right to life and human dignity—is illimitable; however, it does entail that the right to freedom of expression has to yield to very few rights only, and the laws that limit the freedom of expression should be interpreted restrictively (30/1992. (V. 26.) AB). The interpretation, stating that the freedom of the press, despite its role in a democratic society, is not an illimitable fundamental right, is valid. The freedom of the press is enforced against the state; it obliges the state to refrain from interfering with this fundamental right, to

refrain from intervening. At the same time, the obligation to protect the institution detailed above, and the state's liability to treat and protect fundamental rights in relation to each other, provides the opportunity to establish a regulation, also complying with the requirements of necessity and proportionality, in addition to ensuring the free expression of opinion.

The right to freedom of the press can only be restricted in exceptional cases, and only in a narrow scope and to a proportionate extent, provided that this is necessitated by the need to protect another fundamental right, or by the duty of the state to secure the conditions for the creation and maintenance of a democratic public opinion (37/1992. (VI. 10.) AB). The practice applied by the CC so far shows that the freedom of the press, similarly to the freedom of expression, primarily has external boundaries, which may materialize in special institutional forms (eg, the press remedy). Without differentiating between online press products and other media content services, the non-interference in content matters regarding the press means the prohibition of censorship and the right to freely establish newspapers and magazines, and also editorial autonomy (30/1992. (V. 26.) AB).

Since the freedom of the press includes the freedom of all media, the aspects of its restriction apply to the regulation of all media as well. Besides the aspects generally applicable to media, however, when assessing the necessity and proportionality of the restriction of the freedom of the press, the CC has been applying different tests—right from the beginning—regarding the different mass communication means. In the beginning, the CC argued that the reason for a special regulation for radio and television was frequency scarcity, however, with the development of mass communication technologies, the CC elaborated a new standpoint supporting the justified restriction of electronic media. It took into consideration the new possibilities ensured by digital technology, which meant that the argument of frequency scarcity could no longer justify in itself a special regulation for radio and television (1/2007. (I. 18.) AB). Hence, the CC declared the restriction of the freedom of the press as constitutional with reference to the media effect theory, since the opinion-forming powers of radio and television broadcasting and the persuasive effects of audiovisual media content to provoke thought are many times more effective than the ability of other social information services.[3] Later, the CC confirmed this standpoint in terms of the electronic media as well (1006/B/2001 AB). Now the CC has to take into consideration that, with the new developments of technology, the boundaries between the different media types become permeable (convergence), hence the argument of media effect theory can no longer be used to differentiate between the different media contents on the basis of the communications networks forwarding them (165/2011. (XII. 20.) AB).

Besides recognising the differences in the effect of the mass communication services, the CC did not exclude the possibility of content based restriction inducing state intervention for the printed press products either: if any acts of crime are committed or encouraged or incited via the press, or if public morals are violated, these acts can be sanctioned by suspending the distribution of the given publication, or, in certain cases, even by striking down the publication from the register (20/1997. (III. 19.) AB). In cases when a subjective right is violated, the guaranteeing of the right to reply can be seen as a necessary restriction of freedom of the press (57/2001. (XII. 6.) AB). The Constitutional Court found constitutional ways of

3 For more details of the CC arguments regarding media effect theory, see the section on the requirement of balanced coverage.

deletion—that is, for the shutting down of a publication—upon the violation of statutory provisions adopted on the basis of the principles (34/2009. (III. 27.) AB). In the case of the audiovisual media and the radio broadcasting regulated together with them, the Court found that the other statutory instances of content restriction (incitement to hatred, exclusion, racial discrimination, protection of minors, publication of commercial advertisements) were also constitutional based on the media effect theory (1006/B/2008 AB).

According to the CC, concerns regarding the constitutionality of a rule limiting the freedom of the press may arise if the content and extent thereof limit the operation and operating conditions of the free press of a democratic society in an unnecessary and disproportionate manner, disregarding the general and medium-specific standards of the freedom of the press. When examining the provisions restricting the freedom of the press, the CC assesses the content and scope of state control and, in this respect, also its necessity and proportionality. The state may only resort to restricting the fundamental right if the protection or prevalence of another fundamental right or freedom or the protection of another constitutional interest cannot be achieved otherwise. It is also necessary that the restriction of the fundamental right must also meet the requirement of proportionality—the importance of the desired objective and the gravity of the violation of the fundamental right must be proportionate to each other. Any restriction of the substance of the right that is arbitrary and has no compelling grounds or is disproportionate to the objective to be achieved is unconstitutional (30/1992 (V. 26.) AB).

II. The Hungarian Legal System in a Nutshell

A. Sources of Law

The cornerstone of the Hungarian legal system, belonging to the group of continental legal systems, is the FL. Generally compulsory rules of conduct can be prescribed by the FL or a law promulgated in the official gazette,[4] created by a body having legislative competence.[5] The Fundamental Law defines the hierarchy of the sources of laws to be applied in Hungary, and also lists the bodies having legislative powers and also the types of laws they are entitled to create. The different sources of law are not equal in rank. The top of the hierarchy is occupied by the FL, with which no law can be in conflict. Any laws or any provisions of law contrary to the FL shall be annulled by the CC, acting as the supreme body protecting the FL. The Fundamental Law permeates the entire legal system, since the state structure and the legal system are to be constructed according to the rules laid down in the FL.

The following types of legislation (formal sources of law) are listed by the FL: FL, laws (including the so-called organic laws), government regulations, decrees passed by the President of the National Bank of Hungary, Prime Ministerial Decrees, Ministerial Decrees, decrees passed by the head of an independent regulatory body, municipality decrees, furthermore

4 *Magyar Közlöny* to be published as an electronic document on the government portal, the text of which is to be considered as authentic.

5 An organic law may determine different rules for the promulgation of municipality decrees or laws created during times of special rule of law (during a state of external emergency or a state of internal emergency). Organic law (*sarkalatos törvény*) is a law which can be passed or amended with the vote of at least two thirds of the Members of Parliament present.

the decrees published by the National Defence Council during a state of external emergency (*rendkívüli állapot*), or the decrees passed by the President of the Republic during a state of internal emergency (*szükségállapot*). The Fundamental Law also defines the persons or bodies that are entitled to create/draft the different legislation. Here I would like to highlight two types of legislation.

The Fundamental Law and the laws are passed and amended by the Parliament. It is also laid down by the FL that the rules on fundamental rights (such as the freedom of the press) and obligations shall be established by law, furthermore, fundamental rights may only be restricted by law, to allow the effective use of another fundamental right or to protect a constitutional value, to the extent absolutely necessary, proportionate to the objective pursued, and with full respect for the essential content of such fundamental right.

The Parliament may, under organic law, set up independent regulating bodies to fulfil the specific powers and responsibilities falling within the scope of the executive branch. Such a regulating body is the National Media and Infocommunications Authority (the Media Authority). The head of the independent regulating body (such as the President of the National Media and Infocommunications Authority) can issue a decree, based on the authorisation obtained under law, within its scope of duties defined under organic law, which decree cannot be contrary to any law, Government regulation, Prime Ministerial decree, Ministerial decree, and the decree of the President of the National Bank.

There are also other sources of law within the Hungarian legal system in addition to those listed in the FL, of which the following should be highlighted for our purposes. Above all, we should mention here the *CC decisions* which, by creating a coherent conceptual framework, interpret the text of the FL, and append certain provisions to it by applying the fundamental right test[6] thereby creating the so-called 'invisible constitution'.[7] The Constitutional Court decisions are situated below the FL in the hierarchy of the sources of laws, since these can annul any legislation, except the FL, as long as it is contrary to the FL. Though the CC decisions function as a negative legislation, still, certain positive rules of conduct can be read from them, since the CC decisions represent the mandatory interpretation of the FL as established by the CC.

The Fundamental Law has two separate Articles dealing with the relation between the Hungarian legal system and the law of the European Union and international law.[8] As far as the former is concerned, it stipulates that the *sources of EU law* are also part of the Hungarian legal system, in addition to the Hungarian sources of law, and may contain generally mandatory rules of conduct. The principle is related to the principle of direct effect as well, which helps the effective application of EU law in the Member States.

6 The Constitutional Court decisions are not uniform insofar as the elements of the fundamental right tests are concerned, or their content, or their relationship to each other. In connection with the fundamental right tests, out of the formulae used by the CC, I wish to mention the following. The regulation restricting a fundamental right is deemed constitutional, if it is suitable to attain a legitimate legislative objective, in other words, if it is carried out in order to protect another fundamental right or civil liberty, or to protect another constitutional objective; it is justified by a legitimate legislative objective, performed to the necessary extent, proportional, and applies the least restrictive instrument in the course of the legislative restriction. See L Blutman, 'Az alapjogi teszt fogságában' *Jogtudományi Közlöny* 4 (2012).

7 Decision No 23/1990. (X. 31.) AB (ABH 1990, 88, 97–98) on the unconstitutionality of death penalty, concurring opinion of J Sólyom.

8 See, Foundation Article E, and Article Q.

As fas as *international law* is concerned, the FL makes two observations. On the one hand, Hungary accepts the generally recognised rules of international law, which are the general principles of customary international law and international law. These are part of the Hungarian legal system without any separate transformation (53/1993. (X. 13.) AB, 4/1197. (I. 22.) AB). The other sources of international law become part of the Hungarian legal system as of their promulgation in legislation. On the other hand, Hungary ensures the conformity between international law and Hungarian law, in order to meet its obligations arising from international law. This provision not only entails an obligation for the legislator to ensure that the rules of internal law are not conflicting with any obligations under international law, but also that the competent legislator should issue those legislation that are indispensable for fulfilment of an obligation under international law (16/1993. (III. 12.) AB).

Indeed, the *uniformity decisions,* furthermore the court resolutions on principle issues and court decisions on principle issues passed and published by the Curia, being the SC body, can be seen as legal acts applicable to everyone. These decisions guarantee the uniformity of the application of the law by the courts, and the courts are obliged to take these into account in the course of passing their judgments. The directives and decisions on principle issues of the Supreme Court, being the predecessor of the Curia, are to be considered as uniformity decisions as well. The court jurisprudence must also take into account the positions and opinions of the departments of the courts, which contain recommendations on interpretation of the law.[9]

In Hungary, the *customary law of courts* serves as a source of law as well, however, here not the Anglo-Saxon precedent system, but the reference to a permanent court practice prevails. A previous court judgment, in itself, does not predetermine a subsequent court judgment, but rather, the judge selects one way of interpretation of the legislation to be applied out of the numerous other options.

B. Branches of Law

Traditionally, Hungarian legal science classifies the branches of law into three groups: public law, private law and international law. The *public law* branch includes (i) constitutional law; its most important legislation being the FL, the Act CLI of 2011 on the CC, the Act CXXX of 2010 on legislation; (ii) administrative law; its most important legislation being the Act on the general rules of public administration procedures and services (Act CXL of 2004); (iii) financial law; (iv) criminal law; its most important legislation being the Criminal Code (Act C of 2012); (v) criminal procedure law; its most important legislation being the Act XIX of 1998 on criminal procedure. The *private law* branch includes (i) civil law; its most important legislation being the Civil Code; (ii) civil procedure law; its most important legislation being the Code of Civil Procedure (Act III of 1952); (iii) family law; (iv) company law; (v) labour law; its most important legislation being the Labour Code (Act I of 2012). The *international law* branch includes public international law and private international law.

9 Pursuant to Article 195(2) of the Act on the organisation and administration of courts, the directives, the decisions on principle issues and the positions of the departments of the courts can be applied until a uniformity decision (containing a different guideline) is passed.

C. The Judiciary

In Hungary, the judiciary duties are performed by the Curia, the Courts of Appeal, the Regional Courts, the District Courts and the Administrative and Labour Courts. Judicial activities are carried out by the courts, and courts guarantee enforcement of the legislation by applying the law. Courts decide criminal cases, private law disputes, other cases defined by law, furthermore they also pass decisions on the legitimacy of administrative decisions, possible conflict between a municipality decree and other legislation (except the FL), annulment thereof, or establishment of failure of fulfilment of the statutory legislative obligations of local governments. Courts take action in specific cases, basically classified into two larger categories: criminal and civil litigation. At the same time, the so-called labour and administrative litigation also belong to the competence of courts.

The structure of the Hungarian court system comprises of four levels. The lowest level is made of the district, labour and administrative courts, and since this is the lowest level of the organisational hierarchy, most cases are started on this level. As of today Hungary has 111 district courts (*kerületi bíróság*). District courts act at first instance. There are twenty administrative and labour law courts in the country, acting only in special administrative and labour law cases, respectively, at first instance. Their primary goal is to review the administrative decisions and judge the cases related to employment relationships and employment type relationships.

Regional courts act as courts of the first and second instance. Cases may be referred to the regional courts in either of two ways. One way is when a concerned party files an appeal against the judgment passed at first instance (that is at the district court or administrative or labour court). However, not all cases are started at district courts. There are cases which are started at the regional court, which—in these cases—acts as court of first instance. The scope of these cases are determined under the laws on procedure (Code of Civil Procedure, Code of Criminal Procedure). These cases have a predominant importance since either the litigation involves a large amount of money (at least 3 million forints) or the case is special (eg, a legal action filed for press correction/remedy) or an extremely serious criminal act is concerned (eg, homicide, espionage, high treason, terrorist action, etc.). Councils, groups and criminal, civil, economic, administrative, and labour departments are operating at the regional courts, under the direction of the president.

The Courts of Appeal are on the next level of the hierarchy, which review the appeals filed against the decisions of the district courts and regional courts and proceed in other matters referred to their competence. Currently there are five Courts of Appeal in the country, ie, in Budapest, Debrecen, Győr, Pécs, and Szeged.

The Curia stands on the top of the court hierarchy, headed by its President. Its most important function is to establish a uniform and consistent judicial practice. This highly important task is fulfilled by adopting the so-called uniformity decisions. These decisions provide guidelines on principle issues, and are binding for the courts. The Curia adjudges the appeals filed against the decisions of the regional courts and courts of appeal (in the cases defined by law), passes its decision regarding the petitions for review, adopts uniformity decisions binding for all courts, performs jurisprudence analysis in terms of cases closed in a final and enforceable manner, and within the framework of this, it reveals and examines the jurisprudence of courts, publishes court resolutions on principle issues and court decisions on principle issues,

decides whether any particular municipality decrees are in conflict with other legislation, and also on their possible annulment, establishes whether any local government failed to perform its statutory legislative obligation. There are judging, uniformity, municipality, and principle publishing councils, criminal, civil, and administrative-labour departments, and also court jurisprudence analyst groups operating at the Curia.

III. The Hungarian Media Regulations

A. Sources of Media Law

i. Provisions of the Fundamental Law and Constitutional Court Decisions

Out of the direct media law related provisions of the FL, those are the most important that declare the right to the freedom of expression, freedom of the press, and freedom of information, required for creation of a democratic public opinion (Articles IX(1) and IX(2)). The Fundamental Law, in addition to declaring the above mentioned rights, also sets some of their limitations by stipulating that the exercising of the freedom of expression shall not aim to violate or offend the human dignity of others, or the dignity of the Hungarian Nation, the national, ethnic, racial, or religious communities (Articles IX(4) and IX(5)).

The Fundamental Law also stipulates that the detailed rules for the freedom of the press and the body supervising media services, press products, and the communications market can only be regulated under an organic law (Article IX(6)). Accordingly, with the votes of two thirds of the members of Parliament present, the Parliament passed the two most important media laws: Act CIV of 2010 on the freedom of the press and the fundamental rules of media contents (Press Freedom Act, PFA), and Act CLXXXV of 2010 on Media services and mass edia (Media Act, MA).

Besides the above mentioned regulations, several general provisions of the FL also have a bearing on the field of media law (the rule of law, the principle of the separation of powers, the assertion of the rights of national minorities, etc.). As we have mentioned above, the CC decisions represent the mandatory interpretation of the FL as established by the CC, hence the CC decisions are situated below the FL in the hierarchy of the sources of law. The Constitutional Court have been dealing with the definition of the notion of freedom of the press in many of its decisions, and also the conditions required for its potential restriction, and thereby created a mandatory direction for interpretation of the different media law related legislation.

In Hungary, by FL, a new constitution entered into force in 2012, however, this does not affect the applicability of the CC decisions passed under the previous constitution.[10] Although according to the provision enacted by the Fourth Amendment of the FL, the previous Constitutional Court decisions lose effect,[11] in its decision concerning the interpretation of

10 Act XX of 1949; decision No 22/2012. (V. 11.) AB.

11 Fundamental Law, Closing, and Miscellaneous Provisions 5: 'The decisions of the CC taken prior to the entry into force of the Fundamental Law are repealed. This provision shall be without prejudice to the legal effects produced by those decisions.' Established by the Fourth Amendment of Hungary's Fundamental Law (25 March 2013), effective as of 1 April 2013.

the cited provision, the CC pointed out that, when a provision of the previous Constitution and that of the FL are identical in substance, it is disregarding the legal principles manifested in the previous Constitutional Court decision that has to be accounted for rather than adopting them (13/2013. (VI. 17.) AB).

ii. Laws

The Parliament drafted the new media regulations in 2010, transforming the previous three-pillar regulating system (written press, electronic press, telecommunications, and infocommunications) and with effect as of 1 January 2011, created a set of regulations to be uniformly applied for all media. The Press Freedom Act and the MA apply to all media services (content related rules) and service providers (organisational rules), jointly and in relation to each other. These two Acts define the limits of state actions that can be implemented to enforce the rules of conduct as well. Umbrella term of media content (handled and regulated jointly) includes all printed and online press products. These are not differentiated from the other media services based on the technology used for their production but based on their role in mass communication and their ability to influence.

The aim of the PFA, implementing the Audiovisual Media Services Directive (AVMSD)[12] to a lesser extent, is to lay down the most important principles of media regulations. Press Freedom Act, also coined as 'media constitution', provides a detailed description of the constitutional category of the freedom of the press, thereby defining the fundamental rights of the 'press' (ie, the media service providers, the creators of media content). It defines the freedom of the press and declares its independence from the state and any other interest groups. Simultaneously with this, it puts certain public interest duties on the actors of the media market, and defines the entirety of these duties as the 'rights of the audience'. The scope of the Act includes all currently known media, including printed and electronic press and also certain parts of the Internet-based contents drawn under the scope of the regulations. The legislators have transferred the rules of press remedy (right of correction) from the Civil Code to the PFA. The Act also includes certain rights provided to the media and the journalists, such as the right to keep the journalists' sources in secret, or the protection of investigative journalism, editorial freedom, which provide protection to the journalists against the owners and sponsors of media.

The majority of the provisions of the PFA focuses on media contents. In a predefined scope, it provides for the limitations of the freedom of the press in a uniform manner, for all media content, while prescribing special rules according to the specifics of the various types of media content. According to the definitions of the PFA, content control affects all media performing media content provision. Both the media service providers (the media providing linear and on-demand services) and the press products (both printed and online press products) belong here. The amendment of the PFA, entered into force on 6 April 2011, made it clear that media services and the publication of press products shall be governed by

12 Directive 2010/13/EU of the European Parliament and of the Council of 10 March 2010 on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the provision of audiovisual media services.

the PFA as long as the respective activity is carried out for-profit, as an economic activity provided on a commercial basis.

The Press Freedom Act stipulates, as a principle, that 'the exercise of the freedom of the press may not constitute or encourage any acts of crime, violate public morals or the personality rights of others' (Article 4(3)), and requires that 'the media system as a whole shall have the task to provide authentic, rapid, and accurate information' (Article 10). The obligation of balanced coverage is imposed only on the linear service providers (Article 13), however, certain expectations apply to all media content providers (Articles 14–20). Among these, there is the expectation to respect human dignity, protect the rights of the person who made the statement regulated in the PFA, respect constitutional order and there is also the prohibition to violate human rights. Similarly, incitement to hatred, exclusion and violation of privacy are prohibited as well. The above referred provisions of the PFA restrict the possibility of presenting pornography or extreme or unreasonable violence in order to protect minors. Finally, the Act places restrictions regarding the publication of advertisements, the content and appearance of sponsors and sponsorship in commercial communication (including press products as well).

It is the MA that details and differentiates the rules pertaining to media services according to the nature of the respective service, and also, for the most part, it is the MA that implements the provisions of the AVMSD. The Media Act introduced a completely new set of regulations on media law, simultaneously repealing the former media act (Act I of 1996 on Radio and Television Broadcasting, RTBA), Act II of 1986 on the Press, and the Act CXXVII of 1996 on the national news agencies.

The Media Act itself also contains provisions laying down certain principles, and also certain rules regarding the content of media services. It defines the rules of entry onto the market, requires compliance with the rules of preliminary registration as a precondition of media service activities and publication of press products, and settles the rules of tendering for linear analogue media services. Its provisions aiming to prevent market concentration and the special obligations imposed on media service providers with significant market power regulate market conduct. The rules governing public service media outlets (Hungarian Television, Hungarian Radio, and Hungarian News Agency) are contained in the MA as well.

The Media Act changed the previous structure of authorities, merged the official system of media regulations and infocommunications, and created new procedural rules. Together with the institutional changes, it introduced new regulations regarding the provisions governing the supervision of media services, and placed the supervision of press products under its competence as well. It established the institution of the Media and Communications Commissioner together with the related rules of jurisdiction and rules of procedure. For the first time in Europe, it created the possibility of co-regulation in media administration. Based on this option, professional organizations can assume media administration duties from the authority.

Since the media and infocommunications administration is concentrated in one hand, at the National Media and Infocommunications Authority (Nemzeti Média- és Hírközlési Hatóság, NMHH), the Electronic Communications Act (Act C of 2003) affects the operation of the NMHH (and, thereby, the entire system of media regulations). This Act contains the rules on the duties of the state related to electronic communications and the rules on electronic communication services and activities, including the obligations of

electronic communication service providers, and the state's duty to ensure the provision of adequate services to users. Here we should also mention the Act on the rules of media service distribution and digital switchover (Act LXXIV of 2007), which provides for the detailed rules of digital switchover implemented in 2014 on a national level, in addition to laying down the fundamental requirements for media service distributors.

Besides these comprehensive legal acts, certain other laws have a bearing on certain specific segments of media regulations. All the procedures of the Media Authority related to media administration and media supervision are subject to the provisions of the most important legislation of administrative law, that is the Act on the general rules of public administration procedures and services (Act CXL of 2004), in addition to the supplementary and special rules specified in the MA. Here we should also highlight the Act on electronic commercial services, the Act on certain issues of electronic commerce services and information society services (Act CVIII of 2001), the Act on consumer protection (Act CLV of 1997), the Act on the prohibition of unfair commercial practices against consumers (Act XLVII of 2008), the Act on Copyright (Act LXXVI of 1999), the Act on the basic requirements and certain restrictions of commercial advertising activities (Act XLVIII of 2008), the Act on the prohibition of unfair and restrictive market practices (Act LVII of 1996). The civil and penal system for the protection of personality rights should also be mentioned in this context. The detailed rules of this are established by the provisions of the Civil Code and the Criminal Code.

iii. Decrees of the President of the Media Authority and the Recommendations of the Media Council

The President of the Media Authority is allowed to issue decrees pursuant to the authorisation granted by law. This legislative right granted in the field of media regulations includes only and exclusively administrative matters, the determination of the fees payable for certain official (supervisory) procedures and services, frequency fees, and fees payable for the reservation and use of identifiers.

The Media Council (MC), acting as the body of the Media Authority vested with independent powers, issues recommendations in connection with (i) the age rating of programmes and the use of rating symbols; (ii) the effective technical solutions serving the protection of minors, and (iii) product placement. Recommendations are not considered as pieces of legislation and may not be enforced by court procedure. The Media Council defines general rules of conduct in its recommendations, independently from actual cases, it interprets laws and determines its own future practice. The significance of these recommendations lies in the fact that in the specific cases falling within the scope of recommendations, the actions and reactions of the MC becomes foreseeable and predictable.

iv. Self-Regulation and Co-Regulation

The legislator laid down in the MA—as a fundamental principle—that the professional self-regulatory bodies comprising the media service providers, publishers of press products, intermediary service providers, and media service distributors, as well as the various self- and

co-regulatory procedures play an important role in the field of media regulations and in the application of and compliance with the provisions of the MA (Article 8).

As far as self-regulating procedures are concerned, the MA requires, as a principle, that the self-regulatory procedures shall be respected in the application of the MA (Article 8). The Media Act also stipulates that the provisions pertaining to co-regulation shall neither affect nor restrict the right of media content providers to accept and apply self-regulatory initiatives, within the scope of their activities, by organising themselves, within the frameworks of the MA (Article 202/A).

The aim of the co-regulation introduced by the MA is to ensure cooperation between the MC and the self-regulatory bodies, with a view to effective achievement of the objectives and principles set forth in the MA and the Press Freedom Act, facilitating voluntary observance of law and achieving a more flexible system for law enforcement on media administration. Within the framework of the co-regulation, the MC may empower the self-regulatory bodies, via administrative contracts, in terms of the official matter types defined in the MA, to carry out self-regulatory duties *vis-á-vis* the entities falling under the scope of the professional code and code of conduct established by it. Media service providers, ancillary media service providers, publishers of press products, media service distributors, the professional self-regulatory bodies, and alternative dispute resolution forums of intermediary service providers shall qualify as self-regulatory bodies.

So far the MC has entered into administrative contracts with four self-regulatory bodies (which, as a result, qualify as co-regulatory bodies): the Hungarian Advertising Self-Regulatory Body,[13] the Hungarian Newspaper Publishers' Association, the Association of Hungarian Content Providers,[14] and the Association of Hungarian Electronic Broadcasters. Insofar as non-linear media services (printed and online press products, on-demand media services) are concerned, the co-regulatory body can investigate complaints that are related to the following: advertisements violating human dignity, offending religious or ideological conviction; use of subliminal advertising techniques (below conscious perception); advertisements promoting tobacco products, weapons, ammunition, explosives, prescription medication; advertisement content representing harmful or unfair influence to minors.

B. Institutional Structure of Media Regulations

As already noted above, the MA has established a *convergent* authority by merging the media and the infocommunications administration. The Media Authority carries out the following: (i) the issue of media service licences and the supervision of the content of such services; (ii) the tasks of the infocommunications authority, and also (iii) certain competition authority tasks in respect of enterprises operating in the media sector. There is a serious overlapping between the media regulations and the infocommunications regulations; the Media Authority, acting as an authority, has both media administration and infocommunications administration duties. The content issues related to the provision of media services are primarily addressed by the MC, having a separate and independent legal personality within the Media Authority, and partly by the Office having independent regulatory powers.

13 http://www.ort.hu/en/co-regulation/about-co-regulation.
14 http://mte.hu/in-english/.

i. The Media Council

The Media Council is a body of the Media Authority with independent powers under the supervision of the Parliament, and has independent legal personality. The Media Council is the legal successor of the former media authority, that is the National Radio and Television Commission (Országos Rádió és Televízió Testület, ORTT). The Media Council and its members shall be solely subject to laws and may not be instructed with respect to their activities.

For the purposes of this paper, the MC plays the most important role, since it is the body that oversees and guarantees the freedom of the press within the frameworks set by the MA and the Press Freedom Act. For that purpose, it performs the supervisory and control tasks, by recording programme flows or programmes or examining the programme flows recorded by the media service provider, or by making official requests. To fulfil its duties, it operates a programme flow monitoring and analysis service through the Office. Out of the regulations affecting the content of the media services, the MC supervises, within its official competence, the enforcement of the following provisions, having relevance for our purposes:

(i) rules on the protection of children and minors (adopts a regulatory decision on the rating of a programme, at the request of the media service provider);
(ii) the requirements stipulated by the PFA on commercial communications, except for sponsorship, and the general provisions of the MA on commercial communications (eg, prohibition of violation of human dignity, prohibition of discrimination, protection of minors, rules on commercial communication promoting alcoholic beverages, prohibition of editorial influence);
(iii) provisions on product placement;
(iv) the rules on political advertisements, public service announcements, and public service advertisements (with the exception of the provisions on time limits);
(v) the obligations related to advertisements and teleshopping in linear media services;
(vi) the provision of the PFA on protection of human dignity (Article 14(1)).

In all other matters, the MC holds a tender procedure regarding the utilisation of state owned limited resources provided for media services, it evaluates the tenders and enters into a public contract with the winner of the tender. Upon application, it adopts a decision on the connection of media service providers to the network, extension of reception area and amends the public contracts of media service providers. It expresses its opinion regarding draft legislation on media and infocommunications, elaborates official positions and proposals with respect to the theoretical aspects of developing the Hungarian system of media services. It initiates proceedings with respect to consumer protection and the prohibition of unfair market practices; takes an initiator role in advancing media literacy and media consciousness in Hungary. Prepares a report to the European Commission on the fulfilment of obligations with regard to programme quotas, and fulfils numerous other tasks as well.

ii. The Office

The Office acts as the administrative unit of the MC. Out of the regulations affecting the content of the media services, the Office supervises, within its official competence, the enforcement of the following provisions, having relevance for our purposes:

(i) the rules on time limitations of political advertisements, public service announcements, and public service advertisements;
(ii) regulations on advertisements published in public and community media service and public service announcements;
(iii) provisions on media content with violence and suitable to raise disturbance and regulations on the protection of religious convictions;
(iv) the rules on advertising time limits and placement of advertisements and teleshopping;
(v) rules on the sponsorship of media services and programmes.

The first instance procedures held regarding the complaints filed concerning the obligation of balanced coverage shall be held by the Office, with the exception of the media services provided by media service providers with significant market power and public service media outlets (concerning which the MC shall have competence).

The Office shall register the linear media services subject to preliminary notification as well as the on-demand and ancillary media services and press products subject to subsequent notification. It imposes fines if the rules on registration are violated and withdraws the registration if certain predefined conditions occur. It determines the media service provision fee payable by the persons or entities entitled to provide linear media services by virtue of registration. It keeps a register on all linear, on-demand, and ancillary media services, printed and online press products, news portals. The office oversees the enforcement of the rules on the ownership structure of linear media service providers and on ownership concentration, monitors fulfilment of the must-carry obligation of public media services, and exercises other regulatory powers defined by law.

The Office, exercising its non-regulatory powers, (i) prepares the matters falling within the powers and responsibilities of the MC; (ii) prepares the tendering procedure of media service provision rights, holds public hearings; (iii) carries out market analysis, assessment and other inspection activities via the programme flow monitoring and analysis service; (iv) performs other duties defined by law.

iii. Other Law Enforcement Bodies Participating in Media Regulations

Media regulations are affected by other organisations as well, in addition to the authorities directly empowered to administer media related matters. For our purposes, the CC, the courts, and the Commissioner for Fundamental Rights deserve attention. The key role of the CC have already been dealt with above, in the Chapter on the sources of media law. The application of the law by the courts also has direct bearing on the system of media regulation, since, in the final instance, the correct interpretation of the provisions of media law is determined by the courts; via the judicial review system of the administrative decisions passed in media administration, the interpretation of the court necessarily affects application of the law by the authority.

The Commissioner for Fundamental Rights (the Ombudsman) examines or causes to be examined any abuses of fundamental rights of which he or she becomes aware and proposes general or special measures for their remedy. The Ombudsman is not an executive body and has no executive powers, and only acts in the interest of the protection of fundamental rights. The Ombudsman's actions have an effect on media regulation, too, since if he/she notes an

abuse of fundamental rights during the course of the provision of the media service, he/she will report or issue a recommendation to the relevant authority (see, eg, OBH 4247/2003 on the reality show phenomenon). The Ombudsman has competence over the public service media outlets as well.

C. Proceedings of the Media Council and the Office, and the Rules of Court Appeal Procedures

i. Proceedings of the Authority

The proceedings of the MC and the Office (collectively as: The Authority) are subject to the provisions of the Act on the general rules of public administration procedures and services (Act CXL of 2004, the Administrative Proceedings Act, APA), in addition to the special rules specified in the MA. Below I wish to provide a brief overview of the procedural rules that are relevant in terms of the subject matter of this paper.

The procedure is started either at the client's application or *ex officio*. Anyone can turn to the Authority and report a violation of a media administration rule, and the Authority, having assessed the notification, may start the procedure *ex officio*. The administrative deadline for the proceedings of the Authority, as a rule of thumb, is 40 days, which may be extended in justified cases on one occasion, by thirty days at the most. Those administrators shall be excluded from taking part in administration of the given case on the merits, for whom the conditions of exclusion apply, as defined in the APA or the MA, eg, the relatives of the client or the persons having a qualifying holding in the client. In the course of clarification of the facts of the case, the Authority, as a rule of thumb, shall proceed according to the provisions of the APA, however, the MA also contains certain special rules (Chapter IV).

Such a special rule, eg, is that the Authority may oblige the client to disclose data containing business secrets, however, the Authority may not oblige the media content provider or its employee to reveal the informant, that is the identity of the person providing information in connection with the media content provider activity. The person or entity obliged to provide data, despite of having recourse to the exemption, may seek legal remedy with suspensive effect from the Budapest Administrative and Labour Court against the order of the Authority, and the court shall decide in the matter with priority, within the framework of an out-of-court proceeding, within eight days. No further appeal shall be available against the order of the Budapest Administrative and Labour Court.

According to another special rule, the media service provider shall keep the authentic documentation on its programme flow, including the full recording of output signals of the media service, for a period of sixty days from the date of broadcast or, in case of on-demand media services, from the last day the concerned content was made available. The Authority shall be entitled to oblige the media service provider—within the period of statutory retention—to deliver the authentic documentation on its programme flow without delay.

In case of hindrance on the proceedings, the Authority shall have the right to impose procedural fine on the client or any other participant of the procedure, and the maximum amount of such procedural fine shall be twenty five million forints or, for natural person clients, the maximum of one million forints. The Authority shall have the right, and in

case of repeated offence, shall be obliged, to impose a procedural fine also on the executive officer of the breaching entity in case of hindering the proceedings or in case of failure or improper fulfilment of the obligation to furnish data, in the maximum amount of three million forints. When setting the amount of the procedural fine, the Authority shall take into account especially the net sales revenue generated by the breaching entity in the previous year and the fact whether the offence was committed on one or more occasions.

An administrative decision rendered on a discretionary basis can be construed lawful if the administrative body has appropriately ascertained the relevant facts of the case, complied with the relevant rules of procedure, the aspects of discretion can be identified, and the justification of the decision demonstrates causal relations as to the weighing of evidence.

No appeal may be lodged against the regulatory decision of the MC passed in its capacity as authority of the first instance. Review of this decision may be requested only by the client, or, as regards the provisions expressly applicable to him/her, the other participant of the procedure, by claiming infringement of law, at the court proceeding in administrative cases, within thirty days upon announcement of the decision.

The client may file an appeal to the MC against the regulatory decision of the Office, as long as appeal against the given decision is permitted by law. The decision of the Office may be challenged under an appeal only by the client who has participated in the proceedings of the first instance. No appeal shall be available against the decision of the MC overruling the decision of the Office at the second instance. Review of the second instance decision of the MC may be requested from the court proceeding in administrative cases, only by the client, or, as regards the provisions expressly applicable to him/her, the other participant of the procedure, by claiming infringement of law, within thirty days upon announcement of the decision.

Certain orders of the Office defined in the MA can be contested via an independent legal remedy procedure, in an out-of-court proceeding. The respective application shall be filed to the court within fifteen days of the notification of the order.

ii. Rules of Court Appeal (Judicial Review) Procedures

The Budapest Administrative and Labour Court shall have exclusive competence to hold the judicial review procedures initiated to overrule a regulatory decision. The court proceedings shall be subject to the provisions of the Act on the Code of Civil Procedure governing public administration lawsuits (Act III of 1952, CPA, Chapter XX), subject to the deviations specified by the MA. The submission of the statement of claim shall not have a suspensive effect on the enforcement of the decision; the court may be requested to suspend the enforcement of the regulatory decision challenged by the statement of claim.

Unless otherwise stipulated by law, the court shall review the administrative decision on the basis of the legislation applicable at the time the concerned administrative decision was passed, and also the facts of the case. In the event the court finds that any procedural rule has been violated by the authority, affecting the case on the merits, it shall repeal the infringing administrative decision and, if necessary, shall oblige the authority adopting the given administrative decision to perform a new procedure. Otherwise, the court shall have the right to change the administrative decision. An appeal can be filed against the

court judgment if the administrative action was initiated for a judicial review of such a first instance decision regarding which no administrative appeal was permitted. Hence, the court judgment passed regarding a first instance decision of the MC can be appealed, whereas no appeal can be filed against the court judgment adopted regarding the second instance MC decision, overruling the decision of the Office.

Retrial or judicial review can be started against the final and enforceable court judgment, within the framework of an extraordinary legal remedy process. Retrial can be initiated if (i) the party refers to such a fact or evidence or final and enforceable court or other regulatory decision that has not been assessed by the court in the course of the lawsuit, provided that (should that fact, evidence or decision had been assessed) it could have resulted a more favourable decision for the party, and also provided that the party could not enforce the concerned fact, evidence or decision due to a reason outside their control; (ii) the party has become the unsuccessful party of the proceeding, despite the law, due to an act of crime committed by the judge, the opposing party or another person; (iii) another final and enforceable judgment was passed regarding the same right prior to the judgment adopted under the concerned lawsuit; (iv) the statement of claim or other document have been delivered to the party in violation of the rules of delivery (Chapter XIII of the CPA).

Review can be requested from the Curia, by claiming infringement of law, by the party, the intervenor, and also the person / entity for whom the final and enforceable judgment contains provisions, regarding the part of the judgment affecting them (Chapter XIV of the CPA).

IV. Hungarian Media Market Panorama

Before I expound the jurisprudence related primarily to the activity of the linear broadcasters, constituting the backbone of this paper, let me describe briefly the Hungarian television and radio market. The most important characteristic of the Hungarian media market is its relatively small size, which propels market participants towards economies of scale and consolidation. These trends have been intensified during recent years by the impacts the economic crisis had on the advertisement market.

A. The Television Market

Hungary is known as a country with one of the highest television viewing rates, with an average daily television viewing of 289 minutes per resident (!). Slightly more than 96 per cent of the households own a television set, and some 44.9 per cent have more than one sets.[15] There is no television fee in Hungary. Currently only 16 per cent of the television viewers watch television programmes on devices other than a television set. Most of them watch these programmes on PC or laptop, 2 per cent on smart phones and 1 per cent on tablets.[16]

The ratio of cable television subscriptions is 55 per cent, whereas 21.5 per cent of the households have subscribed to satellite television. Analogue terrestrial television broadcasting

15 IP Network and RTL Group, *Television 2014. International Key Facts*.

16 http://www.agbnielsen.net/Uploads/Hungary/res_TVplus_snapshot_final_eng.pdf.

was terminated on 31 December 2014, as a result of the digital switchover implemented on the entire territory of Hungary. The ratio of households with digital terrestrial television is 13.2 per cent. Digital terrestrial service was started in Hungary by Antenna Hungária Zrt., under the name of MinDig TV. The service of MinDig TV offers nine channels (of which five are public service channels) without subscription fee and without the requirement of signing a fixed-term contract (loyalty scheme).

In Hungary, six public service television channels are broadcast, of which four channels have a general entertainment profile (m1, m3, Duna TV, Duna World), and two have a special profile (m2: children channel, m5: sports channel). The audience share of the public service channels is low (16.7 per cent). These channels just cannot compete with the viewership figures of commercial channels.

At the end of 2014, some 687 commercial television media services were available in Hungary. Out of these more than 100 were Hungarian speaking non-local media services, out of them approximately 40 media services were the dominant ones. The majority of non-local television channels ('cable channels') are operating under non-Hungarian media licenses, still, they have a significant role in the Hungarian market. Out of the nationwide commercial channels, the two terrestrial channels, RTL Klub and TV2 are the most viewed.

According to the latest viewership analysis, the share of public service channels rose from 15.5 per cent to 16.7 per cent during the last quarter of 2015, but the viewership of the general entertaining channels (19.6 per cent) and film channels (10.1 per cent) showed a similar increase (1.1 percentage points) compared to the same period of 2014. Children channels reached an audience share of 5.2 per cent (with an increase of 0.8 per cent), music channels reached 3per cent (with an increase of 0.4 percentage point), whereas lifestyle channels reached 2.3 per cent (with an increase of 0.2 percentage point) audience share, as compared to the figures from one year ago. The joint audience share of the two nationwide commercial channels (RTL Klub + TV2) fell from 29.4 per cent to 26.2 per cent, whereas the 3.2 per cent audience share of the news channels was 1.1 percentage points lower than one year ago.[17]

Television plays a huge role in Hungary, without doubt, and there is no sign of any change in the future. Only an infinitesimal part of the viewed television content is non-linear (during the fourth quarter of 2015, some 1.1per cent of the daily television viewing of the total population, that is an average of 3.4 minutes were spent with viewing television content that was shifted in time). Even these days, advertisers and advertising agencies spend the most money on this media type. The first year after the economic crisis when the TV advertising market started to grow, was 2014, and the increase was 10 percent.[18]

It should be noted that advertisement tax introduced in 2014 had a negative impact on television as well. Advertisement tax has changed tremendously during the one and a half year since its introduction. Partly as a result of EU pressure, its progressive nature 'tailored to RTL Klub' was terminated (under the previous scheme, up to the advertising revenue of 500 million forints the tax rate was zero, and above that it was 40 percent). But in 2015 this

17 https://www.mediapiac.com/mediapiac/A-szorakoztato-tartalmak-es-a-hirek-dominalnak/112454.
18 https://www.mediapiac.com/mediapiac/ujra-ketpolusuva-valhat-a-tevepiac/112449.

progressive scheme was cancelled and a uniform tax rate of 5.3 per cent was introduced for advertising revenues above 100 million forints.[19] According to the Hungarian Advertising Association, the most serious consequence of the advertising tax is that it makes the competitiveness of Hungarian companies even worse as compared to the global actors, and as a result, it also decreases the impact of this industry on the economy. The tax rate is higher than the expected increase.[20]

B. The Radio Market

The vast majority of Hungarian radios are terrestrial radios, listed in the register of the NMHH. There are seven public service radio stations, one of these has a general profile, whereas all the rest have some specific profiles (music, news, minority, or broadcasting parliamentary coverage). Out of the commercial radio stations, one station is operating as a nationwide radio (CLASS FM), 39 as regional and 113 as local media services. The number of small community radios is 92. Currently there are seven radio stations available in Budapest and its vicinity within the framework of the DAB+ pilot broadcasting project started in 2011. The coverage within the population of the three Budapest-based DAB+ digital radio services is close to 30 percent. As far as listenership figures are concerned, Class FM is the market leader radio, since it has no competition among commercial radio stations with nationwide coverage.

Almost two thirds (64 per cent) of Hungarians listen to the radio at home, 45per cent in the car, 19 per cent at work or in school, 6per cent mentioned other locations, and only 8 percent of the population does not listen to the radio on an average day. There are similar ratios as far as the devices used are concerned: two-thirds use traditional devices, 45per cent car radio and the total of 16 per cent listen to online radios on different devices.[21]

Radio stations were the most hit by the economic crisis in the advertisement market. In 2009 the industry sustained a 30per cent decrease, whereas in 2010 advertising spending decreased with a further 10 per cent in this segment.[22] The advertising spending figures for year 2014 show that the Hungarian advertising market amounted to 189.05 billion forints, of which the radio revenues were 9.3 billion forints, representing a 5.8 percent increase compared to the figures from 2013. The President of the Association of Radio Broadcasters, joining the radio outlets with larger reception areas, told in his statement made in 2015 that he was expecting a further increase in the advertising revenues of the radio market.[23]

19 Pursuant to Act XXII of 2014 on Advertising Tax, not only the entity publishing the advertisement has to pay the advertising tax regarding the ordered advertisement but also the undertaking ordering the concerned advertisement might become subject of a tax payment liability.

20 http://mrsz.hu/cmsfiles/a2/ce/Hosok_Kora_MRSZ_Urban_Zsolt_v2-2.pdf.

21 https://www.mediapiac.com/mediapiac/Radiozas-a-tel-kozepen/112480.

22 http://radiosite.hu/index.php?option=com_content&view=article&id=1182:gyorshir-eldlt.

23 http://www.tozsdeforum.hu/uzlet/gazdasag/uj-idokre-keszul-a-hazai-radios-piac-48067.html.

V. Restriction of the Freedom of the Press in the Interest of the Protection of Human Dignity

A. Constitutional Protection of Human Dignity

The Hungarian Constitution has declared the inviolability of human dignity for a quarter of a century now. In its resolutions, the CC, the body entrusted with the task of interpreting the constitution, expounded the definition of human dignity and the right to such dignity, thereby charting the scope for action by the Hungarian law enforcement bodies, including the media authority and the courts, with constitutionally binding force, and providing a frame of reference for the justification of law enforcement decisions. Since the object of media law protection is a constitutional provision, it is the jurisprudence of the CC that governs the process of ascertaining the substance of the right that has been violated. The Fundamental Law[24] does not affect the applicability of Constitutional Court decisions passed under the previous[25] constitution (22/2012. (V. 11.) AB). Although according to the provision enacted by the Fourth Amendment of the FL the previous Constitutional Court decisions lose effect,[26] in its decision concerning the interpretation of the cited provision (13/2013. (VI. 17.) AB), the CC pointed out that when a provision of the previous Constitution and that of the FL are identical in substance, it is disregarding the legal principles manifested in the previous Constitutional Court decision that has to be accounted for rather than adopting them. In keeping with this, in its decisions made in the interest of the protection of human dignity, to this day, the Media Authority regularly refers to the following definitions and interpretations expounded in the 'old' Constitutional Court decisions.

On the basis of the concept of man as undivided and indivisible, the CC looks upon human life (the 'body') and human dignity (the 'soul') as an inseparable unity that is the first and foremost of all values. Human dignity, the majesty of our humanity, and value that command unconditional respect, the nobility of the human essence, together with human life, constitute the substance of humanity. Just as human unity, the existence and dignity of the human being are not actual rights, for the human essence is not accessible to the law. Human life and dignity are the sources of rights, values outside of the sphere of the law which are inviolable. The task of the law is to ensure respect for and the protection of these inviolable values (concurring reasoning by CC Judges Tamás Lábady and Ödön Tersztyánszky in 23/1990. (X. 31.) AB).

The Constitutional Court regards the right to human life and dignity as a unified, indivisible, and illimitable fundamental right, the cardinal human right that is the source and precondition of several other fundamental rights. The right to human dignity and life is

24 The Fundamental Law of Hungary, Article II. 'Human dignity shall be inviolable. Every human being shall have the right to life and human dignity; the life of the foetus shall be protected from the moment of conception.' (Effective as of 1/1/2012).

25 Act XX of 1949, Article 54(1): 'In the Republic of Hungary everyone has the inherent right to life and to human dignity. No one shall be arbitrarily denied of these rights.'

26 Fundamental Law, Closing and Miscellaneous Provisions '5. The decisions of the Constitutional Court taken prior to the entry into force of the Fundamental Law are repealed. This provision shall be without prejudice to the legal effects produced by those decisions.' Established by the Fourth Amendment of Hungary's Fundamental Law (25 March 2013), effective as of: 1st April 2013.

fundamentally different from all other rights. While all other rights regulate partial aspects, this right is indivisible and relates to the human being as a whole. Due to its indivisibility, the right to life and dignity is illimitable and forms the principle which the limitation of no other rights may violate (concurring reasoning by CC J László Sólyom in 23/1990 (X. 31) AB).

In a later decision (36/1994. (VI. 24.) AB), the CC expounded that, in respect of human dignity, the above reasoning is normative in itself. From this point onward, in several decisions, the Court mentioned the right to human dignity in itself with no reference to the right to life as inherent, inviolable, and unalienable right of all human beings.

Taxonomically, the CC regards the right to human dignity as the primary human right (a fundamental right); moreover, it defines this right as the mother right of human rights. The substance of human rights originates from human dignity, which is the governing principle of the creation and application of all positive rights. Fundamental rights have to be interpreted expressly in relation to and together with the right to human dignity as their mother right (37/2011 (V. 10.) AB). Accordingly, the CC perceives the right to human dignity as a formulation of the so-called 'general personality right', ie, as the mother right of personality rights (56/1994. (XI. 10.) AB). In keeping with this, the new Hungarian Civil Code provides that 'human dignity and the personality rights originating from it must be respected by all.'[27] Named personality rights originating from human dignity are, for example, the right to honour and reputation, the right to privacy and the protection of personal data, the right to the use of name, the right to images and sound recordings, the right to religious piety and the right to the inviolability of one's private life. Furthermore, the CC regards the right to human dignity as a subsidiary fundamental right to which the courts may resort in defence of the autonomy of the individual if none of the specific, named fundamental rights is applicable to the facts of the case (8/1990 (VI. 23.) AB). The Constitutional Court defined the substance of the right to human dignity by expounding its purpose. According to this, the right to human dignity has two functions.

On the one hand, it expresses that there is an absolute limit beyond which neither the state's nor other people's coercive force may reach, ie, autonomy and self-determination have a core that is beyond the disposal of others, a core whereby the human being remains the subject, and cannot be relegated to the role of instrument or object. It is this concept of human dignity that distinguishes natural persons from legal entities—the latter may be fully regulated and possess no 'immune' essence. Dignity is an *a priori* quality of human life that is indivisible and illimitable (64/1991 (XII. 17.) AB). The right to human dignity does not relate to the person's sense of dignity, which is a function of the person's subject; rather, it means that the law recognises human life together with the human quality (96/2008. (VII. 3.) AB).

The other function of the right to dignity is to ensure equality. The historic achievement of the 'equal dignity of all human beings' entails equal legal capacity, ie, the formal equality of opportunities. Human dignity is shared by all human beings, irrespectively of how much of their human potential they have realised and why (concurring reasoning by CC J Sólyom in 23/1990. (X. 31.) AB).

27 Article 2:42(2) of Act V of 2013 on the Civil Code. By contrast with the previous Civil Code, which understood the right to human dignity as merely one of the personality rights, in keeping with the constitutional law notion, the new Civil Code regards human dignity as the primordial right of personality rights.

B. Restriction of the Freedom of the Press with Respect to Human Dignity

It is an important question in respect of all constitutional fundamental rights whether they may be limited at all and, if so, to what extent, and what considerations should the definition of priorities be based on in the event of their collision. In respect of the freedom of expression and, as part of it, the freedom of the press, this question is especially significant, as these freedoms are among the fundamental values of democratic society.

According to the position of the CC, it does not follow from this privileged status of the freedom of expression that this right—similarly to the right to life and human dignity—is illimitable; however, it does entail that it may yield to very few rights only, ie, the laws that limit the freedom of expression should be interpreted restrictively (30/1992. (V. 26.) AB). In the practice of the CC, the freedom of expression may be restricted in the interest of the protection of the constitutional values of the right to human dignity as an inviolable constitutional right (36/1994. (VI. 24.) AB). This is because, in respect of human dignity, the state's task is not limited to protecting the right of individuals to human dignity; it also includes fostering the evolution of democratic publicity. For example, it is in the interest of this institutional protection task that the state, via the system of media regulation, prohibits the publication of content that violates dignity; this is a constitutional reason for the restriction of the freedom of the press.

This section reviews the media law provisions related to content in violation of dignity that restrict the freedom of the press, in the order of their enactment, along with the dilemmas of their interpretation and application.

i. Limits of the Freedom of the Press and the Radio and Television Broadcasting Act

The first media law statute that contained provisions related to content that violate human dignity was RTBA, which had been enacted on 1 February 1996, and remained in effect until 31 December 2010. Although this Act has been repealed, it is necessary to review its provisions related to our subject as well as the collision-related considerations that arose during the course of its application. The reason for this is that the jurisprudence that matured under the RTBA is authoritative to date in respect of collisions between the right to human dignity and the freedom of the press, when the issue at hand is whether the freedom of the press may be restricted and, if so, to what extent. The present practice of the media authority is based on the experiences of the past and can only be understood in the light of these experiences.

At the beginning of the chapter on the rules of broadcasting, in Article 3(2), the RTBA laid down as a basic principle that the activities of radio and television broadcasters may not violate human rights. Furthermore, in Article 112(1), the RTBA authorised the media authority to take action against broadcasters that violate the provisions of the Act. In the interest of the protection of the right to human dignity as one of the most fundamental human rights, it was the conjunction of these two provisions that provided the legal basis for the activity of the media authority, ie, to initiate administrative regulatory procedures against broadcasters in violation of the law.

Although the provision of the regulation referred to above is quite unambiguous, at the outset both broadcasters and certain judicial fora disputed the possibility of such a restriction

of the freedom of the press. During the initial years of its operation, the media authority itself was uncertain whether it had general jurisdiction in respect of the violation of human rights, the right to human dignity and the specific personality rights derived from it, since traditionally the protection of these was granted by civil and criminal law, because the paradox immediately arises that the media law provision intended to protect human dignity clashes with the constitutional fundamental right to human dignity. The fundamental right to human dignity contains the freedom of self-determination, as the CC had demonstrated in an earlier decision, which demonstration was confirmed in several subsequent decisions, too.[28]

One of the important substantive elements of the right of self-determination as the general freedom of action is that the individual is exclusively entitled to assert their subjective rights in the event of encroachment. The Civil Code effective at the time when the RTBA was in force expressed this right, too, by proclaiming that personality rights, among them the right to human dignity, may only be asserted personally.[29] Furthermore, the right to self-determination also includes the right to waive the assertion of rights, ie, the right of non-action. Since this right serves the protection of the autonomy of the individual, in general, everybody is free to decide whether they choose to assert their claim in the interest of the protection of their rights and lawful interests via the appropriate constitutional avenue or whether they refrain from such action.

On the basis of the aforementioned provisions of the Civil Code, the majority of the first instance court fora that provided broadcasters with legal remedy against the early decisions of the media authority sanctioning violations against human rights took the position that the right to human dignity is a personal right; therefore, in the event of a violation against this right, only the person suffering the legal violation may file action.[30] The courts of second instance passing judgment on the appeals against such first instance judgments, however, uniformly deemed this interpretation of the law to be erroneous and, with reference to the *ad hoc* decisions of the Supreme Court,[31] regarded as normative the interpretation of the RTBA, according to which the media authority is entitled (and obliged) to sanction broadcasters in the event of their violation of human rights.[32] It is the broadcaster that is prohibited by the RTBA from committing violations against the Act, therefore the subject of the RTBA is the broadcaster rather than the person who suffered the injury. Accordingly, by instructing the courts of first instance to rehear the cases, the courts of second instance set a unified direction for the adjudicative practice of the courts with the mandatory instruction that violations against human rights may be examined in media cases.

The Ombudsman, as the official with power to proceed against abuses of constitutional rights, also took a position in the jurisdictional issue mentioned. The Ombudsman's Reports

28 1/1994. (I. 7.) AB (ABH 1994, 29, 35–36), confirmed by 20/1997. (III. 19.) AB (ABH 1997, 85, 90–92), 1270/B/1997. AB (ABH 2000, 713, 721–22).

29 By contrast with the CC approach, in the taxonomy of the previous Civil Code, Act I of 1959, the right to human dignity was one of the personality rights rather than their mother right. Article 76: 'contempt for or insult to the . . . human dignity of private persons shall be deemed as violations of inherent rights.' Article 85(1): 'inherent rights may only be enforced personally.'

30 eg, Budapest Metropolitan Court judgments Nos 2.K.35.503/2000/9., reviewing decision No 776/2000 (X. 4.) of the ORTT, 6.K.32.848/2003/5., reviewing the decision No 738/2003 (V. 29) of the ORTT.

31 Kf.IV.37.230/2002/9., Kf.VI.38.474/2000/3.

32 eg, order No Kf.IV.37.230/2002/9. of the SC in the appeal procedure against the judgment reviewing the decision No 776/2000 (X. 4.) of the ORTT; Budapest Court of Appeal judgment 2.Kf.27.044/2004/7. in the appeal procedure against the judgment reviewing decision No 738/2003 (V. 29.) of the ORTT.

in 2003 and 2004 (OBH 4247/2003, OBH 2203/2004) called the attention of the president of the media authority to the fact that, according to the provisions of the RTBA, during the course of the performance of its supervisory tasks prescribed by law, the media authority, in justified cases is also required to examine whether the activities of the broadcaster violate human rights. The Ombudsman emphasised that, in the event of a violation of human rights (especially the prominent constitutional right to human dignity and the subjective personality rights), in the interest of upholding the rule of law, the media authority is required to exercise its regulatory powers granted by law, and is both entitled and required to protect the fundamental rights granted by the Constitution according to the set of values and conceptual culture of the Constitution as expounded and interpreted by the CC.

The jurisdictional dispute was finally closed by the CC in 2007, when the Court passed two decisions within the framework of posterior norm control that deemed the provisions of the RTBA providing the basis for official action to be constitutional. In the following, I shall present an overview of these two Constitutional Court decisions, which both the media authority and the courts had to take into account in their subsequent application of the law.

In the first decision (46/2007. (VI. 27.)), the CC expressed its position (among other things) in the issue of whether Article 112(1) of the RTBA is contrary to the freedom of the press and the right of self-determination because it enables the media authority to proceed *ex officio*, independently from or even against the express will of the injured party, and establish the fact of the violation of a human right. The Constitutional Court answered the question by saying that the cited provision was a constitutional limitation of the freedom of the press, and did not establish the violation of the right of self-determination either.

At the beginning of the reasoning for the decision, the CC stated that the media authority cannot supervise the lawful operation of broadcasters by the preliminary examination of the content of programmes, as this would be incompatible with the constitutionally recognised and protected freedom of the press. Accordingly, the media authority is only able to sanction the unlawful operation of broadcasters after the fact. According to the other introductory finding of the CC, *ex officio* supervision is not unconstitutional in itself, provided that it is used with proper moderation in the specific procedures of the authority. Thus, the CC held that the possibility of judicial review against the regulatory decision constituted, in general, sufficient guarantee for the prevalence of the fundamental right to the freedom of the press.

Following these two introductory findings regarding press freedom, the CC proceeded with the examination of the collision between the contested provision of the law and the right to self-determination, ie, the issue of whether it is possible to initiate an *ex officio* procedure in the interest of the defence of personality rights that constitute the self-determinative and privacy protection of human rights. With reference to its previous practice expounding the substance of the right to self-determination, the CC posited that, if the broadcaster is found to be in violation of a personal right, on the basis of the right to self-determination, the injured person may decide whether to enforce their personal rights (eg, by taking legal action) against the broadcaster that committed the violation. The Constitutional Court pointed out that, besides judicial procedure, the RTBA admits the institution of public administrative procedure as well. Rather than deciding about the violations of the rights of specific legal subjects, within the framework of this procedure, the authority's task is to establish whether the broadcaster respects human rights during the course of its activities and whether the subject matter, character, and viewpoint of the various programmes violate the fundamental

value manifested in human rights. Accordingly, the CC concluded that Article 112(1) of the RTBA did not violate the right to self-determination. Consequently, it did not violate the right to human dignity protected by the Constitution; therefore, it was constitutional.

In the second decision, No 1006/B/2001, passed on 4 December 2007, besides the provisions of the RTBA prohibiting hate speech, the CC also examined the phrase of Article 8(2) of the RTBA intended to protect human rights ('the activities of the broadcaster may not violate human rights'). The applicant's motion for posterior norm control claimed that the contested part of the text amounted to an unnecessary and unreasonable restriction of the freedom of the press. The option is available to everyone to obtain criminal or civil law protection, redress and, in certain cases, damages in the event of a violation of their rights; it is therefore unwarranted that the RTBA provides for the limitations that are protected by the Constitution itself as well as the Criminal and the Civil Code without limiting the freedom referred to.

The Constitutional Court found the motion to lack sufficient grounds. The Court pointed out that, according to the Constitution, the Constitution and the constitutional legal provisions are mandatory for all legal subjects, including broadcasters (Article 77(2)). Hence, the provision of the RTBA contains as a fundamental principle that the activities of broadcasters must conform to the human rights declared by the Constitution is obviously not in conflict with the Constitution. In the reasoning of the decision, the CC made clear reference to the contents of its previous decision described above and, in this case, too, emphasised that, when proceeding on the basis of Article 3(2) of the RTBA, it is not the legal injuries suffered by specific legal subjects that the media authority decides about, therefore it does not substitute nor impede the assertion of the claims of the holders of the subjective right. The Constitutional Court quoted its own previous decision No 46/2007 (VI. 27.), verbatim, according to which during the administrative procedure the media authority is entitled to establish 'whether the broadcaster operates by observing human rights and whether the subject-matter, nature, or standpoint of its individual programmes violate the fundamental value manifested in human rights.'

From the findings of the above two Constitutional Court decisions, legal practice drew the following consequences in respect of the limitability of the freedom of speech. One consideration is related to the prohibition of the prior examination of the content of programmes. Previously, the authority did pass a number of regulatory decisions related to the programme production activities of broadcasters, and sanctioned them on the basis of the content of the production contracts concluded with the actors as, according to the position of the authority, these contracts were in violation of the participants' fundamental and personality rights. The Ombudsman welcomed the attitude of the authority, and expounded in a 2003 Report (OBH 4247/2003) commissioned by the authority that the possibility of legal violations on the side of the broadcasters arises in the context of the contracts with the actors in individual programmes, especially reality shows, since in these contracts the participants waive so much of their personality rights that they become commercialised tools in the hands of the production companies. According to the position of the Ombudsman, many times already upon the conclusion of the contract establishing their helpless situation, and specifically during each episode, they are placed in situations incompatible with the universal duty to respect human dignity, privacy, and personality, and the illimitability of the capacity of action. The depiction of such situations as 'reality' carries the message that human dignity is not an absolute value and, for financial or other interests, may be limited

or violated at any time without consequence. Indirectly, the RTBA makes it mandatory for broadcasters to align their operation with the human rights declared in the Constitution as well as the underlying constitutional system of values. Accordingly, the constitutional status and protection of the human being may not be violated in the setting of reality shows either. The media authority, as the state organ primarily concerned by the phenomenon of reality shows, bears increased responsibility to ensure that the society-shaping power of broadcasters serves to reinforce the constitutional system of values and passing it on to future generations, rather than act against these objectives. According to the Ombudsman, it follows from the provisions of the RTBA that, during the course of its activities, the media authority entrusted with exercising oversight of the broadcasters is required to hold the latter accountable in the light of these constitutional requirements, too.

The position of the judicial fora, however, was contrary to that of the Ombudsman during the review of the regulatory decisions imposing sanctions on the basis of the production contracts and, even before the two aforementioned CC decisions, they unanimously agreed that the media authority has no right to examine violations against human dignity committed during the course of the production of the programmes, and may only establish violations against human rights on the basis of the actual audiovisual content of the programme. In their judgments, the courts stated that the media authority has no right to examine the content of the contracts between the broadcaster and the participants, as these belong under private law and only concern the contracting parties.[33] Although the Ombudsman based his reasoning on the analysis of the human rights declared in the Constitution and the value system of the Constitution, the CC confirmed the already established judicial practice. According to the CC, the authority has to examine the violation of rights as if nothing else existed apart from the message conveyed via the screen and the loudspeakers. This leads us to the next consideration yielded by the CC decision referred to.

According to the position of the CC, it is through the analysis of the subject matter, nature, and viewpoint of the programmes that the media authority may reach the conclusion that a legal violation has been committed by the broadcaster. On the basis of this, it may be regarded as a correct interpretation of the law if the authority imposes no media law sanction on the broadcaster if the latter substantially distances itself from or argues against an infringing opinion expressed in a call-in programme. The broadcaster may only be held liable if it posits no obstacles to the infringing content reaching the audience. At the same time, the broadcaster does overstep the limit of the freedom of expression if it presents viewers' text messages injurious to human dignity without any obstacles or moderation (this was the case when a viewer's text message called to doubt the human quality of a politician by calling her a 'bitch').[34] According to the position of the authority, the broadcaster may not regard the principle of editorial freedom as ultimate, and is required to proceed with increased responsibility when presenting viewers' opinions. It is worth making one more comment in relation to the aforementioned case, because in its entirety the programme that presented the text message injurious to human dignity obviously did not violate the fundamental value manifested in human rights. Despite the fact that, in general, the authority attempts to meet the requirements of the CC decisions and, accordingly, to examine the programme as a whole

33 See, ORTT decisions Nos 113/2002. (I. 10.) and 697/2005. (IV. 20.).

34 Decision No 1254/2009. (VI. 17.) of the ORTT.

and its nature, and concept, human dignity may be violated by a single sentence or a single frame; something which is recognised by the courts, too.[35]

A further requirement prescribed by the decisions of the CC that must be taken into account by the media authority is that the conduct of the broadcaster must violate the fundamental value inherent in human rights in order to qualify as infringing. Unfortunately, the CC did not elucidate just what the term 'fundamental value' denotes; however, on the basis of the analysis of other Constitutional Court decisions, we may conclude, eg, that since the CC regards human dignity as the first and foremost of values and the source of human rights, the fundamental value inherent in human rights is therefore to be understood to mean human dignity and the human personality. In one of its decisions, the authority interpreted the phrase of the CC to mean that it is the legality of the nature, viewpoint, and subject matter of the programme that must be examined. The subject of the examination is whether the nature, viewpoint and subject matter of the programme was in violation of constitutional fundamental rights and whether the methods applied by the programme are suspected of violating the constitutional protection of personality.[36] We are probably not widely off the mark if we conclude that the authority may take action against conduct on the part of a broadcaster which violates the constitutionally protected values of human dignity and personality.

In keeping with the above, the authority may only apply media law sanctions if, over and above the specific, individual violation, the infringement questions the recognition of human dignity and personality as values. During the public administration procedure, the media authority 'removes the specific subject' of the infringement and protects the institution of human dignity, thereby furthering the realisation of the rule of law. The media authority is entitled to monitor the compliance of the broadcaster with the constitutional provisions under discussion, independently of whether the person shown on the screen takes action to defend their rights or not. The institutional protection of human rights, however, can only be realised with respect to specific infringements, since human dignity is inseparable from the human being. The subject matter, nature, and viewpoint of the programme are capable of infringement against human rights not in themselves, as some conceptual abstraction, but only by way of their effects on the actors that are perceptible to the audience too.[37] With respect to this, the previously cited statements of the CC do not preclude the possibility, which has already been regarded as legitimate by judicial practice, that the authority may hold broadcasters accountable, in the interests of Article 3(2) of the RTBA on the basis of individual injuries, since the human rights referred to by the law are related to persons.[38]

In summary, we may conclude that the two Constitutional Court decisions lead the media authority to proceed in the interest of the institutional protection of human dignity rather than the rights of the individual featured in the media, ie, to refrain from establishing the violation of the personality rights of individuals, as it would thereby encroach upon the cognisance of civil and criminal courts as well as infringe upon the concerned party's right of

35 Decision No 169/2013. (I. 30.) of the MC.

36 Decision No 1510/2008 (VIII. 27.) of the ORTT.

37 A Koltay, 'Az emberi méltóság védelmének kérdései a médiaszabályozásban és a joggyakorlatban' F Gárdos-Orosz and A Menyhárd (eds), *Személy és személyiség a jogban* (Budapest, Wolters Kluwer, 2016); *Jogesetek Magyarázata* 3 (2012); B Török, 'A Legfelsőbb Bíróság ítélete az emberi méltóság sérelmét megállapító médiahatósági határozatról'*Közigazgatási Jog* 3 (2012).

38 Supreme Court Kf.VI.38.474/2000/3.

self-determination. During the adjudication of the infringement, the media authority must focus on the values protected by media regulation and must distinguish between the reasons for such protection and the reasons underlying the rights protection system of other branches of the law. Since, however, the practice of the application of the law has, for a long time, failed to clearly define the role and objective of the protection of human rights (human dignity) within the system of media regulation, in certain cases and under the approval of the courts the media authority has established infringement against Article 3(2) of the RTBA expressly on the basis of individual injuries, too.[39]

ii. Limits of the Freedom of the Press and the Press Freedom Act

The new media law enacted on 1 January 2011, the PFA, brought several changes compared to the previous one. The characteristic solution of the Act is that, in respect of a certain scope, it provided limitations of the freedom of the press in a uniform manner while it prescribed special rules according to the specifics of the various types of media content. Besides radio and television broadcasting services—renamed collectively as audiovisual media services—the material scope of the new Act extends over on-demand media services and printed and online press products, too. Similarly to the previous regulations, the new Act also provided for the protection of human rights; however, the protection of human dignity was categorised under a separate statutory definition, within which a further special statutory definition concerns a specific example of the violation of human dignity, viz, it prohibits the self-gratifying and infringing depiction of persons in debasing and humiliating situations. The original text of the PFA as quoted below authorised the media authority to proceed in the event of violations against human dignity committed during the programme production process, too:

> Article 14(1): The media content provider shall, in the media content published by it and while preparing such media content, respect human dignity.
> (2): No wanton, gratuitous and offensive presentation of persons in humiliating, exposed or defenceless situations shall be allowed in the media content.
> Article 16: Media content providers shall respect the constitutional order of the Hungarian Republic and shall not violate human rights in the course of their activities.

The Constitutional Court overrode the constitutionality of the new rules enacted by the PFA in 2011, and repealed several provisions of the Act by a single decision. Furthermore, the Court provided the law enforcement with clearer reference for distinguishing between institutional protection and the protection of individual rights than the aforementioned CC decisions passed in 2007. In the following, I shall present those provisions of the decision No 165/2011 (XII. 20.) AB that examined the constitutionality of the rules of the PFA on the protection of human dignity and that demolished certain new barriers of the freedom of the press, as well as those that formulated new considerations for the application of the law in respect of the constitutional reasons for the institutional protection of human dignity.

39 See, eg, ORTT decisions Nos 242/1999 (V. 27.) and 1707/2008 (IX. 17.), and the court decisions overriding them.

a. The Constitutional Court and the Freedom of the Press

With respect to the protection of human dignity, the new regulations established a uniform obligation for all actors in the media market, for all media content providers. The legislator intended to ensure the uniform treatment of all three sectors of the media, the audiovisual, the online, and the printed media. The legislator took into account that, due to the development of technology, in recent years the boundaries between the various types of media have become permeable (convergence); the isolation of the sectors of the media is dissipating at an increasing pace and the simultaneous use of writing, sound, and images is becoming increasingly characteristic of the communication of information by all three media sectors. Within this changed environment, the PFA intended to ensure the conditions necessary for the development of democratic public opinion in the entire media sector via the broadened material scope of the Act because, according to the position of the legislator, the media can only become a community forum capable of sensible dispute and respect for the rights and freedom of others via adherence to certain minimum rules.

Although the CC, too, made it clear that media content denying democracy's institutional values associated with fundamental rights is excluded by definition as an instrument for the development and maintenance of democratic public opinion, the Court ruled the extension of the material scope of the PFA over press products, on the basis of the provisions of the Act protecting human dignity (Articles 14(1), 15, the second phrase of Article 16, Article 18), to be unconstitutional, and struck down the part of the text of the Act on press products.[40]

The Constitutional Court pinpointed as the reason for the establishment of the fact of unconstitutionality in respect of online and printed press products the argument based on the mechanism of action, an argument that the Court had taken into account in its earlier decisions, too (1006/B/2001. AB, 1/2007. (I. 18.) AB). In the course of its practice, when examining the constitutionality of a limitation of the freedom of the press, the CC has consistently taken into account the differences between the effects of the various mass communication services on human thought and society. According to the CC, audiovisual content is capable of exerting a much stronger influence on its audience than the other two media; the opinion-shaping effect and persuasive power of motion pictures, sounds, and live coverage are several times greater than the effect of other forms of media content on thought. By the magnitude of its effect, even a single programme of audiovisual media is able to wreak greater destruction in the culture of human rights, and especially the respect for human dignity, than the printed and online press, the effects of which are of a different nature. Television and radio stations provide a ready-made programme flow which reaches the audience in an identical form, therefore, in comparison to other media, they exert a more aggressive effect on viewers and listeners that goes beyond their conscious preference. The Constitutional Court also took into consideration the fact that, despite the increasing significance of the Internet, television and radio are the most widespread mass communication services that reach the broadest spectrum of society.

With respect to the above, the CC maintained that, with regard to audio-visual content, the action of the media authority against the perpetrators, in cases related to the institutional content, of infringements of human rights and human dignity even on the basis of a single programme or a part thereof was justified, and constituted a necessary and proportionate

40 The material scope of the effective of the PFA extends over press products as well, with the exception of Article 14(1).

limitation of the freedom of the press. With regard to the printed and online press, the effects of which are different, the Court deemed that such general possibility of official action constituted a disproportionate restriction. The Constitutional Court did admit the necessity of restriction in the interest of human dignity and human rights in respect of press products, too, but, according to its position in respect of press products, human dignity and human rights are provided adequate protection by the provisions of civil and criminal laws, which enable the enforcement of individual rights as well as the possibility that, on the basis of the first phrase of Article 16 of the PFA, the media authority may take action against media that regularly violate human rights and thus fail to show respect for the constitutional order.

The contention of the CC, according to which the flow of influence theory and the existence of civil and criminal procedures are sufficient to establish constitutional violation in respect of press products,—coupled with the fact that the Court assigned the task of the institutional protection of human dignity to the media authority—is disputable. The Constitutional Court itself may have felt that its decision stands or falls on the adoption of the flow of influence theory, and emphasised that the practice of the assessment of the influence of the various media complied with the provisions of EU law and the underlying considerations.[41] In respect of audiovisual media, the EU synchronised the provisions of the Member States on media content by prescribing the most important minimum rules and indicating that the justification for regulation was not only its economic significance but also its special importance to society and democracy, since audiovisual services influence how public opinion is formed.

Constitutional Court Justices Pokol and Balsai formulated minority opinions in respect of the above outlined CC decision, expressing their dissent against the curtailment of the material scope of the PFA. One criticism held the Court's decision to be unjustified on the basis of media convergence, while the other pointed out that the CC's decision on the removal of online and printed media from the material scope of the PFA contradicted the Court's own argumentation presented in the decision, since there the requirement for the regulation of such media was qualified as constitutional on the basis of the institutional protection of human dignity.

At the same time, the CC also declared that human dignity may be protected in respect of any media content, if the regulation refers to the actual facts of the case rather than a general formulation. Thus, eg, the Court deemed the provision of the PFA on the treatment of people in humiliating, helpless circumstances to be constitutional, as this covers cases of the violation of human dignity that may severely jeopardise the assertion of the substance of the institution of human dignity. Hence, within the scope of such cases, the appropriately circumscribed official protection of rights based on compelling public interest implies a proportionate limitation with regard to every medium. In the case of press products, however, the CC did not admit even the above described provisions that were otherwise deemed to be constitutional, thereby compelling the legislator to enact a new provision,[42] as the material scope of the PFA had to be extended over press products with the exceptions listed in the new provision.

41 Directive 2010/13/EU of the European Parliament and of the Council of 10 March 2010 on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the provision of audiovisual media services (Audiovisual Media Services Directive).

42 Article 16 of Act LXVI of 2012 added the following Paragraph (1a) to Article 2 on the material scope of the Press Freedom Act, effective as of 19th June 2012: '(1a) The scope of this Act—with the exception of Articles 13, 14(1), 19(1), 19(2), and 19(4), the second sentence of Article 20(8), and Article 20(9)—shall apply also to the press products published by media content providers established in the territory of Hungary.'

In keeping with the decision of the CC, the text of the provision on human dignity was amended. The new text reads: 'the media service provider shall respect human dignity in the media content that it publishes.'[43] According to the new text, the media authority may only conduct a general examination of the protection of human dignity with regard to (linear and on-demand) media services, ie, in respect of content shown on-screen or heard on air. The legislator extended the scope of the special statutory definition (treatment of persons in humiliating, helpless circumstances) within the framework of the protection of human dignity over press products via the amendment of the provisions on the material scope of the PFA.

Although the CC regarded the protection of human rights in the PFA to be constitutional in respect of media services and struck it down with respect to press products only, the legislator did not reinstate this provision with respect to media services either; the effective text only provides for respect for the constitutional order, which is mandatory in respect of all media content.

It is worth noting that the PFA admitted the possibility of the authority's action with regard to offences committed during the production of the programme. As such, eg, contracts with participants that deprive them of the possibility of the subsequent assertion of their rights and legal remedy, or which preclude the prevention of the publication of the recording produced, even if the revocation of the participant's consent to publication would not result in disproportionate damage on the side of the media service provider, became objectionable. The media authority, however, did not make use of this new legal instrument and, as a result of the legal amendment necessitated by the aforementioned Constitutional Court decision, as of 19 June 2012, this provision was removed from the text of the act. With reference to the fact that, according to the position of the CC, only the restriction of the media content published via media services is admissible but not the restriction of the production process, the legislator amended this provision of the PFA, even though the CC did not raise this issue specifically.

b. New Arguments for and Limits of the Institutional Protection of Human Dignity

In its 2011 December decision, the CC expounded that the requirement of respect for the constitutional order makes it unacceptable and officially sanctionable if the press continuously or recurrently commits violations against human dignity, or conducts its activities on the basis of views that deny the equal dignity of human beings. The Constitutional Court remarked that human dignity forms the basis for the limitation of the freedom of the press in another respect, too, since persons suffering violations against their rights and dignity may institute proceedings according to the rules of civil and criminal law in the interest of the enforcement of their individual rights.

Following the above introductory remark, the CC emphatically reiterated the argumentation of its 2007 decision, according to which the protection of human rights by the media authority is a special institutional protection procedure, within the framework of which the task of the media authority is not to pass decisions on personal rights but to establish whether the subject matter, nature, and viewpoint of the various programmes

43 The text of Article 14(1) of the PFA effective as of 19 June 2012.

violate the values manifested in human rights. The Constitutional Court offered a number of new arguments in favour of the protection of human rights by the media authority. Using the arguments related to the mechanism of the media's effect, the Court expounded that, since by the magnitude of its effect, even a single audiovisual media programme is able to wreak great destruction in the culture of human rights and especially regarding respect for human dignity, with audiovisual media, official action constitutes a necessary and proportionate limitation. With respect to this, the Court found it justified that the authority—within the scope of the institutional content of these rights—may take action against the perpetrators of infringements, even on the basis of a single programme or part of a programme, not only on the basis of the protection of personality rights but also in the interest of the community.

By contrast with its 2007 decisions, the CC has since clearly sketched out the necessity for separating the branches of the law protecting individual rights from media regulation. It defined the task of the media authority as the protection of the culture of human rights and human dignity; it is within the scope of the institutional contents of these rights that the authority may take action against the perpetrator of the infringement in the interest of the community. According to the CC, the purpose of and the reason for regulation is the protection of the 'institutional content' (rather than specific violations) of the rights in the interest of the community (rather than the individual).

On the basis of the above CC decision, the media authority reached the firm conclusion that it has no powers to adjudge infringing content that concerns only the personal rights of the individual, and may only establish the fact of a violation against the fundamental value of human dignity if the weight of the injury is such that it jeopardises democratic publicity and, therefore, calls for the enforcement of rights in the public interest. According to the position of the authority, it does have jurisdiction if the protection of the public interest calls for it, ie, when the freedom of the press and the fundamental right to human dignity clash, and the interest of the community needs to be protected. The courts, too, supported the position of the authority and confirmed its regulatory decisions claiming a lack of jurisdiction; these did not establish media law violations despite the claims of applicants whose personality rights suffered injuries.[44] In line with the new approach of the authority to the interpretation of the law, the courts found that the violation of public interest necessitating regulatory action in the interest of the institutional protection of human dignity could not be established.

C. Classification of Content Violating Human Dignity

No taxonomic list of legal offences calling for the institutional protection of human dignity can be provided; however, on the basis of the legal practice of the media authority and the related jurisprudence of the courts, the various types of media content violating human dignity may be identified. In one of its decisions, the authority itself classified the contents examined by it into four (non-taxonomic) groups. There are legal offences that cannot be classified into any group, and it is probable that the authority will encounter such cases in the

44 See, eg, MC orders Nos 773/2012 (IV. 25.), 905/2002 (V. 16.), and decision No 825/2013. (V. 14.), and the related court decisions.

future, too. In the presentation of the cases I have adhered to the four-way classification[45] determined by the authority, adding one more group of cases, according to the following.

- Programmes featuring minors: According to the authority, content that depict minors in a manner that violates human dignity and necessitates institutional protection belongs to this category. With regard to minors, the possibility of the individual enforcement of rights is limited; furthermore, their healthy personality development is in the interest of society. As such, official action against content that jeopardises such development is justifiable.
- Programmes featuring people in humiliating, exposed or defenceless situations: The authority takes action against the explicit, recognisable or offensive depiction of people in humiliating, exposed or defenceless situations—eg, the victims of accidents or criminal acts—as, in their case, the individual assertion of rights is limited by definition, and the depiction of people in such situations violates the norms of social coexistence.
- Programmes that objectify people: Regulatory procedure may be triggered by the content of a media service that suggests that no domain of the human personality is sacrosanct, that human life may be taken for money or human dignity may be made public and accessible to all in the interest of financial gain.
- Discriminatory programmes: The programmes in this group treat certain people or social groups as second-class compared to others and/or question their equal human dignity and inherent rights.
- Other programmes that fall under the scope of regulatory procedure: In this group I shall describe cases which cannot be classified under any of the above four types of cases. Here I have also highlighted instances in which the authority did not establish legal violations, claiming their lack of cognisance. The route of the development of these cases is interesting because it sheds light on how the CC's decisions and the changes in the judiciary's interpretation of the law formed and refined the procedure of the authority and judicial practice over time.

i. Programmes Featuring Minors

a. Increased Legal Protection

Naturally, the constitutional provisions protecting human dignity include minors, too. Furthermore, both the previous Constitution (Article 67(1)) and the new FL (Article XVI(1)1) contain distinct provisions in the interest of the protection of minors. On the basis of these, all children are entitled to the protection and care required for their healthy physical, mental, and moral development. Children are entitled to protection and care from all participants in society; accordingly, their parents and all members of the state and society, including media content providers, are required to respect the rights of children.

Hungary, by Act LXIV of 1991, has ratified the 1969 New York Convention on the Rights of the Child, which states that, given their age and the resulting restricted capacity for self-determination, children must be granted special protection in order to ensure the integrity

45 See, eg, decision No 825/2013 (V. 14.) of the MC.

of their rights. During the course of this, all state organs and private institutions must consider first and foremost the interest of the child. The parties to the Convention 'recognise the important function performed by the mass media' and 'encourage the development of appropriate guidelines for the protection of the child from information and material injurious to his or her well-being' (Article 17e), as well as undertake to implement 'measures to protect the child from all forms of physical or mental violence' (Article 19(1)).

In keeping with the constitutional and international state obligations of legal protection, the Act XXXI of 1997 on child protection and custody administration provides that children are entitled to protection from environmental and social effects that are injurious to their development (Article 6(4)).

b. Increased Law Enforcement Protection

Given the fact that the rights of children enjoy increased legal protection, on the basis of the above listed legal acts, the decisions of the media authority in cases that involve programmes featuring children treat the violation of the human dignity of children as an especially grave legal infringement, and sanction them with greater severity.

The healthy and undisturbed development of children is an interest of society that is recognised by the courts as a basis for the enforcement of rights in the public interest and official action in the interest of human dignity. In this case, too, the issue is not the protection of the personality of a specific minor featured in a specific programme but the institutional protection of human dignity which constitutes grounds for action against content that violates or jeopardises the dignity of minors. The social interest attached to the healthy development of minors is incorporated in rights that are superior to almost all other constitutional fundamental rights, among them the right of the freedom of the press.

In its decisions, the media authority regularly refers to the decisions of the CC expounding the substance of the right to human dignity (8/1990 AB, 23/1990 AB, 64/1991 AB) and those that regard the actions of the authority taken under the state obligation of institutional protection as constitutional (46/2007 (VI. 27.) AB and 165/2011 (XII. 20.) AB). In its arguments in favour of this duty of institutional protection, the authority regularly cites one of the conclusions of the Ombudsman's Report in the case No OBH 2203/2004, according to which the media authority is not merely entitled but also obliged to act in the interest of the institutional protection of constitutional fundamental rights.

When passing its decisions, the media authority took into consideration the results of the judicial review and its own previous decisions, and the references to various specific legal cases also serve to provide justification for the authority's action. When referring to previous legal cases, the media authority stressed that the legal violations in these instances ignored such fundamental norms and values of society as, eg, solidarity within the community or the healthy development of minors. Accordingly, in its procedures, the authority did not enforce individual rights on behalf and in the interest of the specific child whose personality had suffered injury, but acted in the interest of the protection required for the healthy physical, mental, and moral development to which children are entitled, ie, the institutional protection of human dignity. In line with the authority, the courts stated that the protection of minors, the undisrupted realisation of their personality, is a common goal and interest of society, and

therefore, in their case, the enforcement of rights in the public interest is called for. It is with reference to this institutional protection of rights and the inviolability of the right to human dignity that the authority ruled—in agreement with the courts—that the fact whether or not the children in the programme related to the legal violation were featured with the consent of their parents (legal representatives) is irrelevant. The media appearance of minors requires their parents' (legal representatives') consent, however, the presence or absence of such consent is not relevant to the decision on the violation of the human dignity of the minor concerned. In the event of consent given by the minor's legal representative, the legal representative cannot surrender the child's right to human dignity by proxy.

c. Jurisprudence

The aforementioned recommendation of the media authority contains special provisions about the depiction of minors in the electronic media. According to the position of the authority, in the interest of the protection of the child's future and long-term interests, no data may be published in the electronic media about minors who are victims, perpetrators, suspects or witnesses of, or otherwise related to, crimes if it would enable their identification (eg, name, image of their face, address). The only exceptions to this are if the publication of the identity of the child serves the child's interest or if such publication has been ordered by a court of law. When reporting about minors in the context of a criminal act, judgmental, condemnatory and profane expressions must be avoided. The subjects must not be described in a denigrating manner or in such a way that might increase the pain and anguish they suffered during the events.

Without exception, the decisions of the authority only impose sanctions in respect of reports and news programmes featuring minors. In the cases described below, the media authority held the media service providers accountable, in keeping with the spirit of its own recommendation in its decisions, all of which have been approved by the courts with final effect.

A 2005 decision of the authority ordered the suspension of a service provider's broadcast for half an hour during prime-time because, in a report covering a 9-year-old sexual abuse victim, the child was featured in the programme in an outrageous manner, mentioning and writing her name, showing her face and making it possible to identify her family and school.[46] The producers of the programme probably neglected the interests of the victim and the possible damage caused by the depiction of the crime in the interest of increasing viewership. The information about the criminal act did not serve crime prevention purposes either, as minor viewers were not provided with any information about protective mechanisms, including who victims in similar circumstances could trust and turn to for help.

Two broadcasters presented the sad case of physical and sexual violence against a 7 year-old victim. In one of the programmes, even the naked photo of the girl as a baby was presented for the sake of sensation. During the report, the child's face was not covered, and she had to listen to a recollection of the assault against her.[47] The other programme presented the family of the victim in detail, the victim's mother and her spouse spoke about the events in the

46 Decision No 478/2005 (III. 17.) of the ORTT.
47 Decision No 722/2012. (IV. 18.) of the MC.

presence of the child and she, too, was interviewed in detail about the assault. The child's face was not covered even then; moreover, several photographic inserts of the terrified girl were shown against the sound of a dramatic score.[48] The media authority conducted regulatory inspection in respect of both programmes of the two programme service providers, and concluded that the broadcasters had committed legal violations of significant gravity, taking into account the special media law protection of the right to human dignity as a fundamental constitutional right and the circumstance that both legal offences were committed by the violation of the human dignity of a minor. In its decision about the nature and extent of the applicable legal consequence, the authority took into account not only the gravity of the offence but also the number of people whose interests had been potentially violated by the offence, ie, the viewership data and the broadcasters' reception areas. With respect to this, a much higher fine (10 million forint) was imposed upon the nationwide terrestrial commercial television station qualified as having significant market power than upon the media service provider with a much lower viewership operating a channel available by subscription only (in its case the amount of the fine was 700,000 forint).

In a different case, although the broadcaster's news programme did not interview the adolescent victim, it aired the video recording the perpetrators of the crime had made about their young victim.[49] The news programme announced that 'a 16 year-old boy was humiliated by his friends in the town of Kalocsa, and the perpetrators recorded the act with the camera of his cellphone; the recording is also coming up soon.' In the video containing humiliating footage, the broadcaster failed to cover the face of the victim, who became identifiable, whereby his human dignity suffered injury. The authority did not accept the explanation of the broadcaster, according to which the inexcusable conduct of the perpetrator had news value justifying the inclusion of the footage in the programme. The authority considered the offence to be especially grave as it had been committed by a public service medium, and the protection of minors is one of the prominent objectives of the mission of such media. Furthermore, the reasoning of the decision referred to the fact that besides the relevant legal provisions the broadcaster had committed a breach against its own Public Service Broadcasting Regulations. With reference to the gravity of the offence, the authority suspended the exercise of the television station's broadcasting right for a period of half an hour during prime-time.

ii. Programmes Featuring Persons in Humiliating, Exposed, or Defenceless Situations

Although the self-gratifying and deleterious depiction of people in humiliating and defenceless circumstances within the framework of the institutional protection of human dignity has only become a separate offence in the Hungarian media regulations since 2011, as part of the general protection of human dignity, the media authority had passed condemnatory decisions about those media service providers that depicted sick people or the victims of accidents or criminal acts in defenceless and helpless situations earlier, too (Article 14(2) of the PFA). In these cases the justification of human dignity in the public interest is that the victims have no realistic possibility of exercising their right of self-determination.

48 Decision No 907/2012. (V. 16.) of the MC.
49 Decision No 952/2009. (IV. 29.) of the ORTT.

In the present chapter I shall start with the examination of the legal cases that emerged under the scope of the previous media regulations. The earlier decisions imposed sanctions on broadcasters for programmes featuring the victims of accidents, while the two later decisions dealt with the violation of the human dignity of a psychiatric patient and homeless man. Finally, I shall examine the single condemnatory decision that has been passed on the basis of the new offence introduced by the new media regulations. Of the few available cases, only one third (ie, two cases) had been subjected to judicial review and so we cannot yet speak of established judicial practice. With respect to this, I shall expound the major observations and experiences related to the judicial practice followed in these two cases.

According to the statement of the facts[50] of the case in the first decision that dates back to 2004, the broadcaster inserted into the programme footage received from the fire brigade which depicted the unfortunate worker who lost his legs from the hipbone downwards in an extremely naturalistic and improper manner. The back of the victim of the accident was shown naked, with his bloody stumps in plain view. The authority established that it is obviously a grave offence against human dignity if footage is broadcast about the victim of an accident shortly after the injury, showing the person in a maimed state, still bloody from the recent injuries suffered. The media authority called upon the broadcaster to present the victim's statement of consent to the publication of the footage, and the television station was unable to do this. The authority regarded this circumstance, which constituted a violation of personality rights as defined by the Civil Code, to amount to a violation against human dignity in itself, since the personality rights named in the civil code are part of the right to human dignity as the general personality right and, as such, are awarded fundamental right protection. The authority sanctioned the television station by suspending the exercise of its broadcasting right for five minutes during prime-time.

In another case, the public service television inserted into its broadcast yet another piece of footage recorded by the fire brigade about a fatal road accident.[51] The footage showed the bleeding victim extracted from the vehicle without blurring the face. Similarly to the previous decision, the authority established that the publication of footage about a person who had recently suffered an accident depicting them in a helpless state and bleeding from their fresh injuries constituted a severe offence against human dignity. Furthermore, the authority quoted a previous judgment of the Supreme Court,[52] according to which the public service purpose of the programme, the provision of information, may be achieved by factual reporting without recourse to sensationalism, therefore excessive brutality is undue and unjustified. The authority also reprimanded the television station for committing a breach against its own Public Service Programme Policy, according to which the publication of footage of unconscious persons is prohibited, irrespective of whether the person is identifiable or not. In its condemnatory decision the authority opted to apply the sanction of a warning.

In 2006, a media service provider broadcast footage of the severely injured victims of a storm that broke out at one of the major state ceremonies, the fireworks of 20 August. The footage enabled the personal identification of the victims.[53] According to the position of the

50 Decision No 1293/2004. (IX. 22.) of the ORTT.
51 Decision No 2638/2006. (IX. 29.) of the ORTT.
52 Supreme Court judgment No Kf.VI.37.118/2001/4.
53 Decision No 2637/2006. (IX. 29.) of the ORTT.

authority, the requirements of authentic, objective, and timely reporting did not call for the detailed depiction of the injuries and agony of the victims. Similarly to the previous case, the authority established that it is obviously a severe violation of human dignity if footage is broadcast of a person who recently suffered an accident which depicts that person, still bloody from their fresh injuries, in a helpless state, screaming, moaning in agony, effectively degrading the subject to the status of an instrument in the race for viewership ratings. The authority also found problematic that the broadcaster had inserted the report into a tabloid entertainment programme between two lighter segments, thereby devaluing the shocking nature of the tragedy. In this case, the broadcaster obtained the written consent of the victims presented in the programme to broadcast the footage recorded during the tragedy; however, the authority declared that, rather than proceeding in the interest of the specific victims, it had taken action against the practice of the broadcaster that had been in violation of the respect for human dignity that is due to all persons. Similarly to the previous case, in this case, too, the authority called upon the media service provider to cease and desist from the offending conduct.

According to the statement of the facts in a legal case examined by a court of law, too, the media service provider sanctioned by a 10-minute suspension of its broadcast time had presented a report about a hospitalised schizophrenic man upon the request of his guardian, the man's mother.[54] The report used hidden camera footage to present the helpless man, who had then been tied down to his bed for one and a half years. Photographs of the man were also presented, and his full name was mentioned in the report. The report emphasized the cruelty and brain-damaging effects of electroshock therapy and, as illustration, showed an excerpt from the film *One Flew over the Cuckoo's Nest*. The mother had turned to the media to call the attention of the public to the intolerable situation of her son, the futility of the several years of medical treatment and the hospital conditions, which were unworthy of human dignity. According to the authority, the programme had violated the patient's right to human dignity by showing him in a helpless situation, tied down to his bed, by recording hidden camera footage in the ward and by not even attempting to get to know his position.

Although at the beginning of the decision, in the reference to the legal provisions on the protection of human dignity and the related CC decisions, the authority made it clear that it examined the fundamental law violation in abstraction from the specific subject, after the statement of the facts it did not expound why, according to its position, the subject matter, nature, and viewpoint of the programme had violated the fundamental value manifested in human rights. The authority referred to the individual legal injury suffered by the patient as the reason for its decision; the institutional contents of human dignity as a value to be protected did not appear in the reasoning. During the review procedure, the authority was reprimanded by the Supreme Court for this deficiency; however, the authority lost the suit not because of this but because, after performing this assessment, the court concluded that neither the subject matter of the programme (that Hungarian healthcare treats certain psychiatric conditions in a manner violating human dignity), nor its nature or viewpoint (the report presented the mother's point of view) were in violation of any protected values of society. The Supreme Court disagreed with the position of the second instance judicial forum that confirmed the regulatory decision; according to this forum, the programme depicting

54 Decision No 1825/2008. (X. 1.) of the ORTT.

inserts of the ill man tied to his hospital bed had not been in violation of human dignity, as its intention had not been the pejorative stigmatisation of the patient. Given the fact that the relevant legal provision does not mention intention or purpose as a requisite for the violation against dignity, the judicial decision closing the case may be regarded as erroneous.

At any rate, the judgment tried to clarify the theoretical foundations of the non-subjective, institutional protection of human dignity in media regulation and expounded, in respect to this, that violations against the personality right of individuals are not, as such, sufficient to call for the application of the provisions of media regulations, as the latter is only applicable in the event of a violation against a 'protected value of society'. The judgment tried to set apart the civil law protection of personality and the applied provision of the media regulations. By contrast with the opinion of the first instance court, according to its position, the task of the media authority is not the examination of whether the person suffering the injury had consented to the publication of their picture and the report, as this belongs to the domain of civil law. Irrespective of whether the personal rights of the party concerned suffered injury or not, the media authority may take action if the value of society protected by the media law provision is violated or jeopardised. At the same time, the authority is required to furnish proof of the existence of this protected value of society.

The three judicial fora proceeding in the case passed three different judgments. The court of first instance instructed the media authority to rehear the case because, according to its position, the issue of whether the custodian of the patient, the patient's mother, had been entitled to consent to the report needed clarification.[55] The court of second instance changed this judgment, and confirmed the decision of the authority on the basis of its reasoning.[56] During the judicial review process, the Supreme Court changed the second instance judgment, and repealed the decision of the authority in respect of the violation against human dignity on the basis of the grounds described above.[57] It is worth noting that, during the same year in another judicial review procedure, the Supreme Court passed a judgment that was contrary to its previous position, and stated that it is not only the subject matter, nature and viewpoint of the programme, but even a single frame or a single sentence within the programme that may constitute sufficient grounds for establishing the violation of the law.[58]

iii. Programmes Objectifing People

According to the interpretation of the CC, the right to human dignity protects people from becoming mere tools or objects.[59] All humans are equal members of society with equal dignity rather than experiment subjects, goods, or the consumer items of others. The irreplaceable and singular human personality cannot be a commodity to be disposed of arbitrarily against financial consideration. Certain programmes violate the right to human dignity by treating the

55 Budapest Metropolitan Court judgment No 16.K.34.758/2008/5.
56 Budapest Court of Appeal judgment No 4.Kf.27.358/2009/7.
57 Supreme Court judgment No Kfv.III.37.554/2010/5.
58 Supreme Court judgment No Kfv.IV.37.171/2011/4.
59 Concurring reasoning of 23/1990. (X. 31.) AB, 64/1991. (XII. 17.) AB.

human being as a commodity, and convey the message that human dignity is not an absolute value, and may be limited or violated at any time without consequence out of financial or other interests. Although such programmes most typically appear in reality shows, the media authority has investigated programmes unrelated to reality shows and found their content to be in violation of human dignity because it debased human life and, consequently, human dignity. I shall analyse these two cases at the end of the chapter.

The court decisions following the media authority procedures launched on the basis of content violating human dignity indicate that judicial practice is not mature and consistent in respect of this subject either. The final court decisions sided with the authority in half of the cases and with the broadcasters in the other half. It is especially striking how the judgment of a court of second instance (the Budapest Metropolitan Court) in respect of a reality show was the exact opposite of the judgment of the Supreme Court in respect of a quiz show three years previously, although the legal issue was the same. In programmes, the participants consented to the publication of sensitive, confidential information concerning their persons. The legal issue to be decided by the courts was whether the broadcasters could commit a violation against human rights that enjoy the protection of the RTBA as well, among them human dignity, by airing the programmes produced with the consent of the participants. The position of the Supreme Court was that the examination should be limited exclusively to the content communicated by the programme, and the contracts signed by the participants are irrelevant. By contrast, a few years later the Budapest Metropolitan Court adopted a different approach, and declared that, on the basis of the participants' consent, the publication of the programme had been legitimate according to civil law, therefore its content could not have been in violation of human dignity. The difference in the position of the two courts passing judgment about the collision between the right to self-determination and the institutional protection of human dignity results in legal uncertainty also because the two fora were not on the same level within the hierarchy of the courts.

a. The Phenomenon of Reality Shows

Under the semblance of objectivity, reality shows depict the everyday 'reality' of ordinary people isolated from the world, which, in reality, is controlled by the editors. In their production contracts, participants waive so much of their personality rights that they become commercialised tools in the hands of the production companies. Many times, already upon the conclusion of the contract establishing their helpless situation, and specifically during each episode, they are placed in circumstances incompatible with the universal duty to respect human dignity, privacy, and personality.

In the annex of the decision related to a matchmaking reality show,[60] the authority listed in detail the objectionable content and scenes of the programme. In the programme, a man moved into a villa in the company of 16 ladies to find himself a wife. The participants were given tasks in the programme that debased their femininity, eg, they had to take an 'erotic' shower under the garden faucet in the company of a dead fish. Furthermore, the participants had to prove the honesty of their feelings towards the male star in a mock

60 Decision No 1044/2011 (VII. 19.) of the MC.

polygraph test. During the test, the participants found themselves in debasing, humiliating, and defenceless situations capable of totally objectifying their personalities. In the given context, the participants were reduced to the level of consumer goods, completely at the mercy of the media service provider. This was reinforced by the comment of the lead actor's friend, according to which the contestants appear in the programme to put themselves totally at the service of the leading man ('Come on, she's not here to reject you!'). According to the position of the authority, statements presented as truths to the broad public—which were often concerned with the sexual lives of the participants and offering sexual services for financial gain—could have had a negative effect on society's opinion of the contestants as well as their personal relationships.

The authority found it especially problematic that sexual services rendered for financial gain and fame without any genuine emotions were depicted as exemplary, rather than condemnable conduct. The authority found the mock polygraph test, the deception of the participants, to be incompatible with respect for the human personality, because it conveyed the message that, rather than being an inalienable value, human dignity may be violated and limited out of financial and other interest. In its decision, the media authority quoted several passages verbatim from the report of the Ombudsman (OBH 4247/2003) as arguments for the right of the authority to proceed and to pass condemnatory decisions against the broadcaster on the basis of a violation of human dignity, even without the consent of the participants, because consent to conduct violating personality rights cannot be unlimited; the limitation of self-determination is that it may not violate or jeopardise the interest of society.

The broadcaster moved for the judicial review of the decision imposing a fine of 500,000 forint on them; during the course of this procedure the first instance judicial forum rejected the action; however, the second instance forum accepted the arguments of the broadcaster. In its judgment, the first instance court only examined the legal provisions on the protection of minors, and did not provide the grounds for accepting the findings of the regulatory decision on the violation of human dignity to be legitimate.[61]

By contrast with the Ombudsman, the court of second instance, proceeding on the basis of the appeal of the broadcaster, did not see any civil law basis for establishing that a violation against human dignity had been committed.[62] The main argument of the judicial reasoning was that the actors voluntarily consented to their appearance in the programme. Accepting the broadcaster's argument, the court established that the conduct to which the rights holder had consented did not violate personal rights. By contrast with the Ombudsman, the court did not regard the consent of the participants as violating or jeopardising the interest of society, and agreed with the claim of the broadcaster that the authority had castigated the broadcaster on the basis of human dignity in the moral sense. The court did not take the provisions of international, constitutional, and civil law declaring the illimitability of the legal capacity of persons into account either, and did not examine whether these provisions are violated with regard to reality show participants who *de facto* subordinate their physical and psychological selves and personalities to the business interests of the broadcaster via private law contracts. Since, on the basis of the consent of the participants, the court of second instance found the broadcasting of the programme to be legitimate from the aspect of

61 Budapest Metropolitan Court judgment No 3.K.33785/2011/11.

62 Budapest Metropolitan Court acting as court of second instance, judgment No 2.Kf.650.037/2013/4.

civil law, it found that because of this, the content of the programme could not have violated human dignity and was objectionable, at best, on the basis of ethical norms only.

b. Other Programmes Debasing the Value of Human Dignity

The media authority's decision introducing a new approach in the authority's interpretation of a violation against human dignity gained broader (professional) publicity.[63] The programme under examination was a game show, prior to the studio recording of which the participants had to undergo a polygraph test that consisted of various yes/no questions, part of them casual and part of them awkwardly sensitive in nature. When later on the same questions were asked from the participants during the show, after each answer it was immediately shown whether the polygraph found the answer to be true or false. The contestants could only remain in the game for as long as the polygraph indicated that they replied truthfully. The programme required participants to make public the innermost elements of their private lives in the hope of winning the cash prize. The structure of the programme made it impossible for participants to evade surrendering their personality entirely, since if someone declined to answer and thereby gave up the possibility of winning a considerable sum of money, this suggested to the viewers the admission of the statement formulated in the question posed. This was the first time when the authority adopted in its practice the constitutional theory according to which the human being's freedom of disposal in respect of its personality, ie, the right of self-determination, cannot be suspended via a contract. According to the view of the authority, the entire nature and point of view of the game show constituted a severe violation of the inviolability of privacy, informational self-determination, and human dignity. According to the finding of the authority, the programme conveyed the message that human personality has no integral, sacrosanct domain; a human being may be humiliated to the point of utter transparency, privacy may be made public, and human dignity is not inviolable. The authority found institutional protection necessary on the basis of the nature of the message. In order to provide the legal basis for the decision, besides the provisions of the Constitution and the CC decisions providing their detailed interpretation, the authority also referred to Article 8 of the Rome Convention for the Protection of Human Rights and Fundamental Freedoms, which declares that 'Everyone has the right to respect for his private and family life, his home, and his correspondence.'

In the court procedure for the judicial review of the regulatory decision suspending the broadcasting time of the media service provider for a period of 30 minutes, the court, similarly to the previously cited case, emphasised in the reasoning of its judgment granting the petition of the media service provider that the contestants had voluntarily consented to the polygraph test and the publication of the questions and answers.[64] During the clarification of the facts of the case, the court established that it was not during but before the programme that the contestants had first heard the questions about their most intimate problems and secrets, and therefore they were aware of what they had just consented to. As adults with full legal capacity, the contestants could decide what to make public and where the limit is, beyond

63 Decision No 748/2008. (IV. 29.) of the ORTT.
64 Budapest Metropolitan Court judgment No 20.K.32.503/2008/7.

which they believed disclosure would be debasing and contrary to their dignity. Accepting the argument of the broadcaster, the first instance court stated that conduct approved by the right-holder does not violate personality rights. In the opinion of the court, the extent to which one is willing to reveal their inner, personal secrets to the public for a certain amount of money is at the discretion of the individual concerned. According to the court, the programme not only conveyed the message that human dignity may be debased to any extent but—because the programme had evoked negative sentiments from many viewers—it also reinforced consciousness of the fact that there do exist people who would not answer such questions in public for any amount of money. The court also agreed with the claim of the broadcaster that, in respect of the programme, the media authority had castigated the broadcaster on the basis of the concept of human dignity in the moral sense. With respect to these considerations, the court of first instance amended the regulatory decision, established that the broadcaster had not violated human rights, and abolished the sanction imposed upon the broadcaster of a 30-minute suspension of its broadcasting time.

The media authority filed an appeal against the first instance judgment, in agreement with which the court of second instance established that the game show had been in violation of human dignity.[65] The court of second instance cited the question described in the first instance judgment that had been posed by the litigating parties for the decision of the court: Is the limitation of human dignity to the extent achieved in the programme admissible or not? It was this question that the court took as the starting point for its judgment, and agreed with the authority when assessing whether a legal violation had been committed that the examination should be limited exclusively to the content communicated by the programme, and the production phase of the programme, the manner of the selection of the participants and the contracts signed by them were irrelevant. With respect to this, the court viewed the video cassette containing the recording of the programme, and had no doubt that human dignity had been violated.

The broadcaster submitted a petition to the Supreme Court for the judicial review of the final judgment within the framework or extraordinary legal remedy. The Supreme Court maintained the force of the second instance judgment.[66] The Supreme Court established that the nature, subject matter and concept of the programme was to produce shocking circumstances within which the participants' innermost private secrets were revealed to the viewers, despite the intentions of the participants to keep them confidential. The tension of the game originated from the fact that the participants were free to consider whether to answer the question posed or not, ie, they gave genuine consent to the publication of private secrets. If they told the truth, it was tantamount to giving consent, while if they refused to answer or lied, that amounted to the revocation of their preliminary consent. If the show presenter communicated that the answer of the player had been false, this amounted to the communication of the truth despite the intention of the player, which violated the player's right to self-determination or, if the polygraph was wrong and false information was communicated, then the player's reputation.

According to the court, under the doctrine of the rules protecting privacy, conscious consent is only possible within a specific situation, because uninformed preliminary 'blanket'

65 Budapest Court of Appeal judgment No 4.Kf.27.147/2009/4.
66 Supreme Court judgment No 4.Kf.27.147/2009/4.

consent is insufficient to allow injury to reputation in a specific case relating to a specific topic in a specific way. Assuming conscious consent, the players would have had no problems with telling the truth during the show; however, this would have removed the element of suspense from the game, defeating its entire concept. The programme could only achieve the desired effect on the viewers if the right to informational self-determination and, consequently, the human dignity of at least some of the players suffers injury. One of the central effects of the programme used to increase viewership and cause 'shock' was that it brought to life the innermost secrets of people who were different from the average or whose lives were unfortunate; secrets that were shameful, embarrassing, and awkward. The essential objective of the programme was the violation of the most fundamental human values embodied by human rights. Reflecting upon the first instance judgment, the court remarked that these fundamental values naturally express moral values, too; therefore, the requirement of respect for human dignity is an ethical norm as well and so the legal assessment of the case necessarily expresses a moral value judgment as well. However, the court stressed that the purview of the authority and the courts is founded on legal provisions rather than ethical norms.

iv. Discriminatory Programmes

One of the functions of the right to dignity is to ensure equality, to recognise the equal legal capacity of all human beings. The fundamental right to equal dignity provides the reason for and the substance of the constitutional right to discrimination-free treatment,[67] whereby Hungary grants fundamental rights to all, free of any discrimination based on race, colour, gender, disability, language, religion, political or other views, national or social origin, wealth, birth or any other status. During their compliance with their duty to protect fundamental rights, the state and its organs—among them the media authority—are required to ensure the prevalence of the principle of equal dignity in respect of those groups and their members, too, which—due to widespread prejudices within society—are more prone to become victims of stereotypical paradigms of thinking and prejudice-motivated actions and which prevent them from fulfilling their lives as persons of equal dignity.

The content of the specific programmes examined by the media authority suggested that certain ethnic communities and entire groups of society consisted of second-class citizens who had no human dignity or who should be deprived of such dignity. The infringing programmes typically attributed race-based characteristics to ethnic minorities, called their humanity into doubt and stigmatised entire groups of society. It is the value of human dignity that suffers injury when viewers encounter opinions that call its equality and universality into doubt. Facing such content, the authority deemed that measures taken in the interest of the institutional protection of human dignity were justified.

In one of the cases,[68] the programme of a minor local television station produced in-house presented a number of criminal offences (assault and battery, robbery, manslaughter), calling the perpetrators of these Gypsies, even though no official information of proof was

67 Article XV(2) of the Fundamental Law.
68 Decision No 828/2011 (VII. 19.) of the MC.

available on their ethnic status.[69] The presenter depicted the Roma minority in a stereotyped negative role, clearly contributing to prejudicial thinking on the side of the viewers. The radical technique used for communicating the inferiority of the Roma people and the dehumanisation of the Roma was a recurring element in the programme. The programme contained expressions of the most vulgar kind ('genetic thrash unworthy of the word "human", not humans, protozoan parasites'), practically excluding the Roma from mankind. According to the view of the authority, the producers of the programme clearly ignored the principle that respect and recognition are the birthright of all human beings, ie, that human dignity, as the fundamental human right provided for by the constitution, is indivisible, illimitable, and equal in respect of all human beings. The denial of the value of equal human dignity resulted in a violation against the fundamental value of human dignity so grave that it justified the institutional enforcement of claims. With respect to this, the media authority established the violation of human rights protected by the RTBA. The local television station, fined 25,000 forint, did not apply for the judicial review of the decision.

The authority also imposed a fine (500,000 forint) on the broadcaster that dealt with the current problems of Hungary, especially the situation of the Roma minority, in one of its programmes.[70] The recurring motif of the programme was a crime committed in Olaszliszka in 2006, when Roma perpetrators beat a non-Roma schoolteacher to death before his children's eyes. After presenting the details of the Olaszliszka case, the host of the programme drew the conclusion that Hungary is plagued by Gypsy terrorism. The programme depicted the Roma minority collectively as a group of parasites living on aid, whose members fail to respect the norms of society, engage in criminal conduct, terrorise the Magyars feeding them, and, in general, reject the norms of social co-existence. By referring to the 'criminal tendencies' of the Roma minority, the programme presenter attributed a race-based collective characteristic to the Roma, and had questioned their humanity by calling them 'parasitic humanoids'.

In a statement made in reply to the authority's call, the media service provider brought up in its defence that the expression aired in the programme (eg, 'murderers of Hungarians', 'lacking all humanity') were taken verbatim from the criminal court judgment in the Olaszliszka manslaughter case, and mere citations cannot be qualified as legal offences. The part of the judgment describing the personal circumstances of the defendants stated that they had no jobs and lived on aid, therefore the objective basis of the characteristic opinions of the presenter were beyond dispute, and could not be construed as self-gratifying, baseless communications. The media authority, however, did not share the opinion of the broadcaster; according to the authority, the details of the criminal case cannot justify the legality of the programme, since the programme intended to present the current situation of the Roma minority in Hungary rather than the criminal case.

In this case, too, the media authority established that the producers of the programme had clearly disregarded the fact that human dignity is equal in respect of all. The publication of the programme resulted in severe injury to the fundamental value of human dignity, since the

69 It is noteworthy that the publication of ethnic identity in criminal reports is problematic in itself since, on the basis of the Hungarian Privacy Act (Act CXII of 2011 on informational self-determination and freedom of information), data on racial origin or nationality qualify as special data, the processing of which requires the written consent of the data subject or authorisation by law.

70 Decision No 1153/2011. (IX. 1.) of the MC.

media service provider questioned the humanity of Roma ('the parasitic humanoids lose their humanity, their human face'). The authority emphasised that its decision had been motivated by the intention to protect the equality of human dignity, a value worthy of protection against the freedom of the press, and it was not the rejection of the extreme opinion formulated in the programme that led to the limitation of the media service provider's right to the freedom of the press. According to the position of the authority, the programme depicted the entirety of the Roma people—as an ethnic minority—as a criminalised group that had lost its human face, therefore the violation against human dignity had reached an extent that calls for the enforcement of claims in the public interest. As such, the programme necessitated regulatory procedure irrespective of the individual legal injuries suffered.

VI. Restriction of the Freedom of the Press in Media Law Practice in the Interest of the Prohibition of Hate Speech

A. Constitutional Arguments for the Prohibition of Hate Speech

The Constitutional Court's understanding of the concept of hate speech is very broad (95/2008. (VII. 3.) AB). Accordingly, it includes the offences collectively known as 'incitement against a community' (also known as '*agitation or provocation against a community*'), the use of symbols of tyranny, hateful slander against specific persons, defamation, and the communication of racist generalisations. The first time the CC defined the constitutional basis for the restriction of the freedom of opinion was when, in its decision No 30/1992 (V. 26.; CCD1), it examined the constitutionality of the two offence types ('instigation of hatred' and 'offensive speech') defined by the previous Criminal Code as incitement against a community.[71] The prohibition of these two forms of hate speech under criminal law has effectively restricted the freedom of opinion and, within that, the freedom of speech and the freedom of the press, therefore CCD1 has outstanding significance, and to date, it has served as a reference for the decisions of the media authority related to hate speech. In Hungary, a debate is still going on regarding the interpretation of the constitutional measure of instigation of hatred as provided for in CCD1.[72]

Due to size constraints, the present paper is only able to dwell upon the differences of interpretation very briefly; however, a brief review of the outlines of the topic is indispensable, since the jurisprudence of the media authority has been fundamentally affected by the approaches that have become mainstream in constitutional law and the practice of criminal law, ie, the 'standards' summarising the criteria for the punishability of hate speech, which

71 At the time of the CC's posterior norm control, the text of Article 269 of Act IV of 1978 on the Criminal Code, defining the offence of incitement against a community reads as follows:—
(1) A person who, in front of a large public gathering, incites hatred
a) against the Hungarian nation or any other nationality,
b) against any people, religion or race; furthermore, against certain groups among the population, commits a felony and is to be punished by imprisonment for a period of up to three years.
2) Anyone who, in front of a large public gathering, uses an offensive or denigrating expression against the Hungarian nation, any other nationality, people, religion or race, or commits other similar acts, is to be punished for a misdemeanour by imprisonment for up to one year, corrective training or a fine.

72 A Koltay, 'A nagy magyar gyűlöletbeszéd-vita: a "gyűlöletre uszítás" alkotmányos mércéjének azonosítása felé' Állam- és Jogtudomány 54(1–2) (2013) 91–123.

measures restrict the freedom of the press. First, I shall present the conditions formulated in the CCD1, the CC decision fundamental from the aspect of the limitability of freedom of expression. According to the CCD1, freedom of speech is a fundamental right of all citizens during the course of individual self-expression and debates on public affairs; as such, there is no possibility to restrict speech on the basis of its content (the so-called principle of content-neutral restrictions). The objective criterion for state intervention cannot be established on the basis of the extreme, coarse or injurious nature of speech; freedom of expression may only be subject to external restrictions. As the general test of such external restrictions, the CCD1 provided that 'laws restricting the freedom of expression are to be assigned a greater weight if they directly serve the realisation or protection of another subjective fundamental right, a lesser weight if they protect such rights only indirectly through the mediation of an "institution", and the least weight if they merely serve some abstract value as an end in itself (public peace, for instance).'

Furthermore, according to the position of the CC, the state may only resort to restricting the fundamental right if the protection or prevalence of another fundamental right or freedom or the protection of another constitutional interest cannot be achieved otherwise. The fact that the fundamental right is restricted in the interest of the protection of another fundamental right or freedom or the attainment of another constitutional goal does not guarantee the constitutionality of the restriction, which must also meet the requirement of proportionality; the importance of the desired objective and the gravity of the violation of the fundamental right must be proportionate to each other. During the application of the restriction the legislator is required to apply the most moderate solution that is capable of attaining the given objective. Any restriction of the substance of the right that is arbitrary and has no compelling grounds or is disproportionate to the objective to be achieved is unconstitutional. Taking into account the above considerations, in the CCD1, the CC established that the aforementioned criminal law restriction of the freedom of expression and the freedom of the press was necessary and justified, given the historically proven injurious effect of incitement to hatred, the need to protect fundamental constitutional values and compliance with the obligations taken on in various international conventions.

Furthermore, the CCD1 defined the concept of incitement to hatred, and the CC has relied upon this definition in its subsequent decisions related to media regulations. To start with, therefore, it is worth reviewing these definitions. According to the interpretation of the CC, incitement to hatred is the emotional preparation for violence, the denial of the right to be different, the protection of minorities and actual or threatened violence as an acceptable means of resolving conflicts. It is an abuse of the freedom of expression; an intolerant classification of a certain group of human beings that is characteristic of dictatorships rather than democracies.

According to the criminal law statement of the facts, the act perpetrated is instigation of hatred, and the manner of perpetration is qualified as 'before a broad public audience'. Hatred is one of the most extreme negative sentiments, an intense hostile emotion. If someone instigates, that person provokes, encourages, and urges hostile behaviour and hostile acts, resulting in harm against some individual, group, organisation, or measure. Instigation means a virulent outburst which is capable of whipping up such intense emotions in the majority of people which, upon giving rise to hatred, can result in the disturbance of the social order and peace. The expression of unfavourable or offensive opinions does not qualify

as instigation, as that requires the expressions and comments to target emotions rather than the intellect and that they are capable of arousing passion and hostile sentiments. In respect of the concept of instigation, it is totally irrelevant whether or not the facts stated are true; what matters is that the given communication is capable of arousing hatred. The term 'broad public' includes the perpetration of the criminal offence via the press, too.

According to the reasoning of the CCD1, 'instigation of hatred' as the act perpetrated and 'before a broad public' as the manner of perpetration together are sufficient as grounds for the application of criminal law sanctions, since the consequences of such conduct and method of preparation are so grave in respect of both the individual and society, that other forms of liability, such as liability for regulatory offences or liability under civil law, would be insufficient against the perpetrators of such acts. According to the position of the CC, the qualification of instigation of hatred as a criminal offence meets the requirements of necessity and proportionality, because it encompasses only the most dangerous forms of conduct, and the factual elements of the case may be interpreted clearly during the application of the law.

At the same time, the CC found the punishability of a use of abusive, offensive or denigrating expressions that does not reach the level of instigation to be unconstitutional and struck down the relevant part of the statement of the facts. In the reasoning, it referred to the fact that the definition of offensive/denigrating speech does not set up an external limit, but qualifies it on the basis of the intent of the given opinion, to which a violation of the public peace is only related on the basis of assumption and statistical probability. CCD1 called the state's approach to forming public opinion and political style via a criminal law offence 'paternalistic'. The maintenance of the pubic peace does not inevitably necessitate criminal law sanctions against the use of expressions denigrating or offensive to the community before a broad public; the criminalisation of offensive speech would constitute an unnecessary restriction of the right to the freedom of expression, therefore it would not be proportionate to the attainment of the desired objective.

The part containing the reasoning for striking down the delict of offensive speech contains the proposition that has been the subject of subsequent debates. The passage contains important observations about instigation of hatred, according to which, in the event of such instigation, 'the question is not only the intensity of the disruption of public peace which—above and beyond a certain threshold (clear and present danger)—justifies the restriction of the right to freedom of expression. What is of crucial importance here is the value that has become threatened: instigation endangers subjective rights which also have a prominent place in the constitutional value system.'

The positions of the experts interpreting the reasoning of the CCD1 may be classified into three groups.[73] One of these groups understands the reasoning to call for the mandatory application of the United States' benchmark of clear and present danger (or some very similar measure). According to the other group, although the American measure has not been introduced, instigation of hatred may only occur if the communication results in some real and tangible peril; while the third group is that of the traditionalist disciples of criminal law, according to whom it is sufficient for the delict if the opinion is capable of instigating hatred.

The measure set up by the CCD1 was confirmed by the CC decision No 12/1999 (V. 21; CCD2), which declared that the text 'or commits another act capable of the arousal of hatred', added to the definition of the offence in the Criminal Code in 1996, was unconstitutional.

73 ibid.

The Constitutional Court held the cited text (among others) to be unconstitutional because the penalisation of this conduct lowered the threshold of legitimate restriction, as in the CCD1, the CC identified instigation of hatred, rather than 'arousal of hatred' in general, as the constitutional divide between what is indictable and what is not.

In 2004, the CC published its position on the interpretation of the measure set up by the CCD1; the CC decision No 18/2004 (V. 25.) AB (CCD3) clearly favours the applicability of the measure of clear and present danger. CCD3 examined the qualification of the perpetration of the act of arousal of hatred, which was intended to replace instigation of hatred or the use of denigrating and humiliating expressions as criminal offences, and found that qualification to be unconstitutional. According to the reasoning of the CC, it follows from the equality of the fundamental rights of the members of the political community that, on the basis of the Constitution, all persons are equally entitled to the right of speech, ie, everyone may express their opinions within the framework of democratic communication. Accordingly, the protection under the fundamental law of utterances cannot be denied simply because they violate the interests, views or sensitivities of others or are offensive or injurious to others. The content of an extreme opinion cannot provide an adequate basis for the restriction of the freedom of speech, as that restriction may only be based on the immediate, foreseeable consequence of the utterance of such an opinion, ie, the injury or jeopardy to the exercise of the fundamental individual right. The danger to public peace should be more than a mere presumption; the communication must be capable of disturbing the public peace and, moreover, the intensity of such disturbance must reach the level of clear and present danger.

To provide the grounds for its position, the CCD3 borrowed examples from criminal law practice, too, and took into account a case-law decision that was incorrect in respect of criminal law doctrine and diverged from the previous judicial practice. According to this, instigation of hatred requires the existence of three conditions: 'instigation of is to be established when someone calls for (i) a forcible act, or the commission of such conduct or act; (ii) if the danger is not merely a presumed one but the endangered rights are concrete, and (iii) the threat of the forcible act is direct' (BH2005.46.). It is worth noting that the above cited *ad hoc* criminal law decision is an example[74] of how, over recent years, positions different from the classic criminal law paradigm have become dominant within criminal law practice as a result of which the criminal law protection of hate speech in Hungary is practically unparalleled.[75] On the basis of the established judicial practice, in most cases the investigating authority closes the procedure without filing charges in instances of suspected incitement (instigation) against a community and, if a case does make it to court, it very rarely results in conviction.[76]

Besides the CCD1, the CCD2 and the CCD3, which embody the principle of content neutrality, there exist CD decisions which uphold the principle of content-oriented restriction, too. In the

74 For further examples, see, BH1997. 165., EBH199. 5., BH2011. 242., EBH2010. 2215.

75 '[T]he new benchmark (or, given the lack of consistency: benchmarks) posited in the decisions of the criminal courts have led to an unconstitutional interpretation of the Criminal Code, as by virtue of such judgments, incitement (izgatás) against a community has gone from an abstract offence to becoming a specific offence, ie, a material offence' source: Zs Szomora, 'Az alkotmánykonform normaértelmezés és a büntetȉjog – problémafelvetés' Zs Juhász, F Nagy, Zs Fantoly (eds), *Sapienti sat. Ünnepi kötet Dr. Cséka Ervin professzor 90. születésnapjára* (Szeged, SZTE, 2012) 464–65.

76 J Utasi: 'A gyűlölet-bűncselekmények elemzése. Esettanulmányok I. és II.' *Belügyi Szemle* 1, 2 (2012).

CCD1, the CC emphasised that the dignity of communities may act as a constitutional restriction of the freedom of expression, in the interest of which the legislator may take protective criminal law measures that go beyond the delict of instigation of hatred, or may resort to other legal instruments, eg, by extending the scope of the application of indemnification for non-pecuniary damages. With reference to this, the CC's position is that the criminal law restriction of conduct violating the dignity of communities and jeopardising the public peace is constitutional in respect of a sphere of cases broader than just instances of instigation of hatred but narrower than all instances of offensive speech. For example, the so-called 'symbol decision'[77] recognised that there are certain opinions that may be criminalised on the basis of their content, and found such criminal law restrictions to be constitutional, even if the case did not contain the elements of imminent violence or threat to individual rights that are characteristic of instigation of hatred. Furthermore, the CC also found state action to be constitutional when offensive expressions injurious to human dignity but unrelated to any specific person are uttered in the media as the media's power to influence and affect society is special. In the next two chapters I shall present these two constitutional court decisions which reviewed the provisions in media regulation which prohibit hate speech.

B. Restriction of the Freedom of the Press and Prohibition of Hate Speech

The first Hungarian media law act to prohibit hate speech was the RTBA. Despite the fact that this act was only effective until 31 December 2010, it is necessary and worthwhile to review its relevant provisions, because the findings of the CC decision overruling their constitutionality serve as reference for the constitutional assessment of the regulations currently in effect, the substance of which has remained identical. Following the overview of the relevant provisions of the RTBA and an examination of their constitutionality, I shall present the currently effective regulations and the CC decision reviewing their constitutionality.

i. Limits of the Freedom of the Press and the Radio and Television Broadcasting Act Prohibiting Hate Speech

At the beginning of the chapter providing for the rules of broadcasting, in Article 3(2), the RTBA provided as a fundamental principle that 'programme providers shall operate with respect to the constitutional order of the Republic of Hungary; their activities may

77 Decision No 13/2000 (V. 12) AB examined the constitutionality of the delict of the 'defamation of national symbols' while CC decision No 14/2000 (V. 12) AB examined the constitutionality of the delict of 'the use of symbols of tyranny'. Similarly to the 'symbol decisions', 16/2013 (VI. 20.) AB ruled that the provisions of the Article 269/C of the former Criminal Code, which ruled that the denial, disputation, or trivialisation of the genocide and other crimes against humanity committed by the national socialist or communist regimes are indictable, were constitutional. As opposed to the previous two, the third 'symbol decision', 4/2013. (II.21.) AB, found Article 269/B of the former criminal code, which provided that the use of the symbols of tyranny was indictable, unconstitutional and struck it down. The reasoning behind the decision was that the provision, which was held to be problematic from the aspect of legal certainty, defined the forms of indictable conduct too broadly without differentiating or taking into account the purpose, the manner and the result of the act, which led to arbitrary interpretation and application of the law. In keeping with the decision of CC, the legislator corrected the definition of the delict by defining the mode of its perpetration, and this was reinserted into the Criminal Code as of 30 April 2014.

not violate human rights, and may not be capable of inciting hatred against individuals, genders, peoples, nations, national, ethnic, linguistic and other minorities, and church or religious groups.' Article 3(3) provided for another offence which, although incapable of inciting hatred, consists of the communication of socially harmful offensive opinions. According to this, 'broadcasting may not be aimed, openly or surreptitiously, at insulting or for the exclusion of any minority or majority group of society, or to depict any view of them, discriminatory or otherwise, on the basis of racial considerations.'

It was the basis for the Media Authority's measures against hate speech appearing in radio and television broadcasts. An applicant moved for the posterior norm control of the above-cited provisions of the RTBA and the phrase about the protection of human rights in Article 3(2) before the CC, as a result of which the body passed the Constitutional Court decision No 1006/B/2001 on the media law protection of human dignity. In the following, I shall summarise the findings of this decision related to hate speech.

The provisions contested by the applicant submitting the motion formulated legal restrictions for broadcasters in respect of the production and the content of the programmes, that is, first and foremost, they provide for the limitation of editorial freedom which is part of the freedom of the press. Given the fact, however, that the press is an important instrument and forum of the freedom of expression as well as informing and shaping public opinion, the restrictions that place limitations on editorial freedom obviously affect the freedom of expression, too. Bearing this in mind, the CC examined the contested provisions of the RTBA within the context of the freedom of expression and the freedom of the press.

In its introduction, the CC summarised its previous decisions on the role and possibility of the limitation of the freedom of expression and the freedom of the press, concluding that freedom of expression and the freedom of the press do not qualify as illimitable fundamental rights within the jurisprudence of the CC, either. Legal provisions limiting the freedom of opinion, however, must be interpreted strictly, while the restriction of the freedom of the press may be admissible in the interest of the protection of another fundamental right, on condition that the restrictive provision is necessary, and the weight of the desired objective is proportionate to the extent of the violation against this other fundamental right. In this instance, this other fundamental right was the right to human dignity. Although the Constitution assigns this right to individual persons, the CC had extended it over communities, too ('the dignity of communities').

When examining the admissibility of the limitation of freedom of expression and the freedom of the press, the CC attached decisive significance to the international obligations Hungary had undertaken via various international conventions.[78] Several international

78 Universal Declaration of Human Rights (Articles 1, 7, 12, 19, and 29); Article 10(2), 14, and 17 of the Rome Convention of 4 November 1950 for the Protection of Human Rights and Fundamental Freedoms (promulgated by Act XXXI of 1993); Articles 2, 3, 4, and 7 of the International Convention on the Elimination of All Forms of Racial Discrimination concluded in New York on 21 December 1965 (promulgated by Statutory order No 8 of 1969); Articles 2(2), 19(3), 20, and 26 of the International Covenant on Civil and Political Rights adopted by the XXI session of the General Assembly of the United Nations on 16 December 1966 (promulgated by Law-Decree No 8 of 1976); Article (7)1 of the European Convention on Transfrontier Television adopted in Strasbourg on 5 May 1989 (promulgated by Act XLIX of 1998); Point II.B. of the so-called Vienna Declaration adopted by the UN on 9 October 1993; Article 6 of the Framework Convention for the Protection of National Minorities of the Council of Europe adopted in Strasbourg on 1 February 1995 (promulgated by Act XXXIV of 1999); Recommendation No R (97) 20 of the Committee of Ministers to Member States on 'Hate Speech' (adopted by the Committee of Ministers on 30 October 1997 at the 607th meeting of the Ministers' Deputies).

documents denounce racism, incitement to hatred (hate speech), exclusion and discrimination against individuals or groups of society, as well as the instigation of such. Furthermore, the CC cited the findings it had put forward in the CCD1 on the constitutional conditions of the criminal law limitation of incitement to hatred. From these, I wish to highlight that, according to the position of the CC, the constitutional protection of incitement to hatred within the framework of the freedom of the press and the freedom of expression would result in an irresolvable conflict with the system of values represented by the Constitution and the constitutional doctrines of the democratic rule of law, the equality of citizens, the prohibition of discrimination and the protection of ethnic minorities.

Based on the above, therefore, according to the position of the CC, if in respect of a certain conduct that is harmful to society—in this case instigation of hatred, incitement to hatred—even liability under criminal law is admissible and constitutional as a last resort, the less strict prohibitions applicable to the given conduct under other branches of the law cannot be considered to be unconstitutional either. The Constitutional Court, however, failed to elucidate in detail where the media law benchmark, that is lower than that applied by criminal law, actually lies.

That is, in respect of incitement to hatred, the CC reasoned for the constitutionality of the media law standard being lower than the criminal law one on the basis of the protection of another fundamental right and freedom, Hungary's international obligations and the system of values manifested in the Constitution. Accordingly, the CC did not deem the prohibition of incitement to hatred according to Article 3(2) of the RTBA as an unconstitutional restriction of the freedom of the press.

In its decision, the CC treated the delict of incitement to hatred as defined in the RTBA and the instigation of hatred as defined by the Criminal Code as synonymous. During the application of the law, the media authority did not interpret this as implying that the delict of 'incitement to hatred' (*gyűlöletkeltés*) under media law is identical to that of 'instigation of hatred' (*gyűlöletre uszítás*) under criminal law; since the limit of the freedom of the press under media law is lower, the criteria for establishing liability under media law are different, as is the subject of the procedure under media law.

The Constitutional Court also made clear its position in respect of the constitutionality of the prohibition of offensive communications provided for by Article 3(3) of the RTBA. In relation to this, the question posed by the CC was whether the freedom of expression and the freedom of the press extend over the publication of opinions that do not reach the level of instigation of hatred. According to the position of the CC, although within the system of liability, offensive speech does not call for the application of the most severe, ie, criminal law sanctions; however, in the interest of the protection of the honour and dignity of individuals and communities, offensive expressions of opinion may be restricted as well. The media law prohibition of offensive speech, which entails a much lower standard than the limit deemed to be constitutional in criminal law, is held by the CC to be necessary and constitutional on the basis of the system of values of the Constitution in the interest of the protection of the rights of others and the dignity of communities. Freedom of expression and the freedom of the press are not absolute values, and do not provide legitimation for the production and broadcasting of infringing programmes.

In the reasoning of the decision, the CC referred to the argument based on the mechanism of action. According to this, the media are the primary source of information; the effect of the

opinions published in the media is magnitudes larger than that of any other manifestations of the freedom of speech; the media have an extremely great influence on people's thinking and the formation of public opinion. The Constitutional Court referred to one of its previous decisions (1/2007 (I. 18.) AB) that treated as generally accepted that the opinion-forming powers of radio and television broadcasting and the persuasive effects of moving images, audio, and live coverage are many times more effective than the ability of other social information services to provoke thought. With respect to this, it also took into account the fact that the broadcasting of programmes found to be offensive or exclusionary to, or discriminative against, persons or certain groups within society may have similarly considerable negative effects of unforeseeable magnitude.

When adjudging the constitutionality of the contested provisions, the CC also took into account that the system of sanctions attached to the prohibitions is differentiated at the normative level, enabling the application of the law to impose sanctions adapted and proportionate to the gravity and consequences of the infringement, the judicial review of which sanctions is also available, thereby ensuring the possibility of legal remedy.

Last, but not least, I shall summarise the findings of the CC decision that are the most significant for the application of the law. One of these is that simultaneous availability of various rights protection mechanisms in respect of certain fundamental rights which exist in parallel with and complementary to each other, and the fact that even different proceedings can be conducted simultaneously under different branches of law does not violate, and, moreover, does not even restrict unnecessarily the constitutional freedom of expression and the freedom of the press. It was neither unconstitutional nor unnecessary that media law added a further rights protection mechanism to the already existing mechanisms under civil law (lawsuit for the infringement of personality rights) and criminal law (defamation, slander, incitement against a community). The result of this is that the legitimacy of the procedure of the media authority in relation to hate speech is beyond dispute.

The Constitutional Court also pointed out that the media law prohibition of offensive speech does not mean disputes and criticism have no place in radio and television programmes, or the pluralism of the opinions of society was banned from such programmes. The purpose of the provision is to avoid a situation where radio and television become 'amplifiers' of hate-mongers inciting offensive, race-biased, discriminatory speech. The conduct of the broadcaster may not be adjudged exclusively on the basis of what opinions receive publicity in the programme; the subject of the examination is whether, on the basis of all the circumstances of the given case (eg, the manner of the publication of the opinion and whether or not the reporters distanced themselves from the given opinion) indicate whether the objective of the programme as a whole was infringing. The Constitutional Court made the cited pronouncement with reference to the Convention for the Protection of Human Rights and Fundamental Freedoms, concluded in Rome on 4 November 1950, the provisions of which are directly enforceable and may be referred to by individuals before the Hungarian courts. It was under the auspices of the Convention that the European Court of Human Rights decided in the *Jersild v Denmark* case,[79] and the judgment contained the findings referred to above. It is worth noting that, prior to the Constitutional Decision discussed here, in 2003 a Hungarian first instance judicial forum had already made reference to the

79 Case No 15890/89, judgment of 23 September 1994.

Convention and the jurisprudence under its scope, including the *Jersild* case, in a judgment reviewing a decision by the media authority related to hate speech.[80]

ii. Limits of the Freedom of the Press in the Application of the Law on the Basis of the Provisions of the Press Freedom Act Prohibiting Hate Speech

The Press Freedom Act has brought about a few changes while leaving the essence of the previous regulation of hate speech intact. Besides radio and television broadcasting services—renamed collectively as audiovisual media services—the material scope of the new Act covers on-demand media services and printed and online press products, too. At the time of the promulgation of the new act, the text of the provisions on hate speech was almost identical to that of the previous regulations. Article 17(1) of the PFA defines the delict of incitement to hatred, prohibiting communications capable of inciting hatred against any person, nation, community, national, ethnic, linguistic or other minority or any majority, as well as any church or religious group. Article 17(2) of the PFA prohibits the use of offensive or denigrating expressions capable of openly or covertly insulting or excluding the above-mentioned groups of society.

The legislator amended the original text of the act several times. For example, the term 'person' was struck out from both paragraphs. The reason for this was to avoid misunderstanding, because, according to the reasoning of the legislator,[81] the provisions are intended to protect the various groups and communities of society; individual people cannot receive protection on this basis. The previous practice of the media authority has altered accordingly, as the authority took measures in the interest of the communities against broadcasters publishing content harmful to society, without violating the right of specific individuals to self-determination. The phrase 'openly or covertly' was struck out from the provision on offensive or denigrating expressions in Article 17(2);[82] this was due to the request of the European Commission in the wake of the uproar caused in Europe by the new Hungarian media regulations. As a result of this, the paragraph referred to currently only prohibits communications resulting in exclusion. The effective text of Article 17 of the PFA is as follows:

> Article 17 (1) The media content may not incite hatred against any nation, community, national, ethnic, linguistic or other minority or any majority as well as any church or religious group.
> (2) The media content may not exclude any nation, community, national, ethnic, linguistic and other minority or any majority as well as any church or religious group.

As has already been mentioned in the previous part about the media law protection of human dignity, the CC overrode the constitutionality of several provisions of the PFA in a single ruling (decision No 165/2011 (XII. 20.)). Below, I shall present the provisions of this CC decision that have a bearing on the new rules on hate speech.

80 Budapest Metropolitan Court judgment No 24.K.32822/2003/10. on the judicial review of the ORTT decision No 1516/2003 (IX. 4.).

81 Amended by Article 65(7) of Act CVII of 2011, effective as of 3 July 2011.

82 Amended by Article 11(3) of Act XIX of 2011, effective as of 6 April 2011.

In relation to hate speech, the CC cited several of its previous decisions on the subject. One such was Constitutional Court decision No 96/2008. (VII. 4.), which defined the substance of discriminatory, hateful speech. According to the CC, hate speech is akin to the elements of totalitarian ideologies, as the proponents of such positions strive to drive the targeted community and its members to the margins of society, and call their equal dignity into question as a result of which that community and its members are regarded as inferior, and become exposed and defenceless. Media content providers which transmit discriminatory and hate-mongering ideas to the public as their own call one of the substantial elements of the constitutional order, the recognition of the equal dignity of human beings, into doubt.

Furthermore, the CC referred to Constitutional Court decision No 1006/B/2001 reviewing the provision of the RTBA, prohibiting incitement to hatred, in which the Court identified incitement to hatred with instigation of hatred and—since the latter is sanctioned under criminal law—accepted it as a constitutional basis for the restriction of the freedom of the press. The Constitutional Court merely confined itself to confirming this earlier position, and declared that, irrespective of the mechanism of action of the various media, the prohibitions provided for by Article 17 of the PFA are constitutionally justified, necessary and proportionate limitations of the freedom of the press with regard to all media content. The Constitutional Court's reasoning for the decision referred to the dual foundation of the substance of the freedom of the press, ie, the press serves both the right of individual freedom of expression and the right to information about affairs of public interest. Media content denying the institutional values associated with fundamental rights is excluded by definition as an instrument for the development and maintenance of democratic public opinion.

The Constitutional Court did not dwell upon the details of the relationship between the criminal law and the media law measure of hate speech in this decision either; however, it made it clear to law enforcement that it regards the media law delict of incitement to hatred as identical to the criminal law delict of instigation of hatred. In respect of this, the CC referred to its decision No 1006/B/2001 which overrode the similar provisions of the MA; however, it provided no guidance as to the interpretation of this statement in practice.

In decision 1006/B/2001, passed in 2007, the CC indeed treated the expressions 'incitement to hatred' and 'instigation of hatred' as synonymous with one another; however, prior to decision No 165/2011 (XII. 20.), the media authority's position was that incitement to hatred under media law is not identical to the criminal law concept of instigation of hatred; the authority regarded the limitation of the freedom of the press to be lower under media law than under criminal law, and pointed out that the conditions of the establishment of liability under media law are different, as is the subject of the media law procedure. From the decision 165/2011 (XII.20.), however, the media authority inferred that, since both the two delicts and the manner of their perpetration are identical, the media law standard of hate speech cannot be lower than the criminal law measure. As a result of this, the media authority's scope for action in the application of the law shrank significantly in respect of the restriction of the freedom of the press, and since the landmark CC decision was passed practically no condemnatory decisions related to hate speech have been issued against audiovisual media service providers.

The Constitutional Court decision referred to contains no provisions as to the media law interpretation of exclusion; however certain authors[83] hold that the single measure posited

83 B Török, 'A gyűlöletbeszéd tilalmának médiajogi mércéi' *Jogtudományi Közlöny* 2 (2013).

by the CC decision applies to all forms of hate speech in the media, and so it is applicable to hate speech as well. Given the scarcity of the regulatory decisions related to exclusion, we cannot speak of an established practice yet, and we may expect future arguments over the interpretation of Article 17(2) of the PFA.

C. Regulatory Decisions Related to the Prohibition of Hate Speech and the Relevant Judicial Practice

The media authority's decisions passed on violations against the media law prohibition of hate speech by audiovisual broadcasters may be classified into two main groups. The basis of classification is the media law measure of hate speech that had been low until the decision 165/2011 (XII. 20.), at least in comparison to the criminal law measure of the admissible restriction of the freedom of the press. During this initial period, between 2001 and 2010, the media authority passed 33 decisions in cases involving radio and television broadcasters, all of which were condemnatory and established infringements by the broadcasters. In the wake of the above-cited CC decision that was pivotal in respect of the application of the law, since 2012 the media authority has not passed a single decision closing the regulatory procedure that established that an audiovisual media service provider committed a violation against the media law provisions prohibiting hate speech.[84]

i. Application of the Low Media Law Measure (2001–2010)

Common to the hate speech-related media authority decisions passed between 2001 and 2010 is that they applied a much lower standard to hate speech than did criminal law. The decision of the initial phase of jurisprudence (2001–2004) contained practically no theoretical clarification as to the nature of this low measure in media law; however, the reasoning of the decision No 117/2002 (I. 10.) of the ORTT provides an excellent example of this low threshold, as it classified offensive, injurious criticism as incitement to hatred, too. In the condemnatory decision referred to, the media authority 'concluded that the broadcaster had consistently and deliberately depicted the Jewish, Roma, and homosexual minorities in a negative light, and had used humiliating and crude expressions about them on several occasions.'

It was the ORTT decision No 326/2005 (II. 17.) that first declared that the conduct sanctioned by the Criminal Code as 'instigation of hatred' is not identical to the conduct of 'incitement to hatred' as defined and sanctioned by the MA; however, the Commission failed to clarify the difference. At the same time, this was the first decision that represented

84 András Koltay distinguishes three phases in the practice of the authority. He identifies two separate phases in the initial period treated as a single unit by myself: he sets apart 'the period between 2001 and 2007, characterised by seeking directions and burdened with uncertain measures ("seedling measures"), but reaches the conclusion that, in respect of hate speech, the criminal law standard and the media regulatory standard are not identical, and—in respect of restricting freedom of speech—the latter is more permissive,' and identifies the 2008-2011 period as a distinct second phase 'following CC's first media-related decision, when the concept of the identity of the two measures was clearly, albeit tacitly, discarded.' A Koltay, 'A médiahatóság döntései és azok bírósági felülvizsgálata a gyűlöletbeszéd tárgyában (2001–2013)' *Médiakutató* 3 (2013).

the position according to which a programme shall not qualify as violating the law if, within the context of the entire programme, the hate-inciting content is presented in such a manner that makes it clear that the purpose and nature of the presentation is purely the provision of information and that the broadcaster distances itself from the content. The position statement of the media authority examining the liability of the broadcaster was adopted from a first instance court decision on the judicial review of a previous decision of the ORTT (No 1516/2003 (IX. 4.)),[85] which referred to the jurisprudence of the European Court of Human Rights. Given the importance of the case—the media authority referred to the first instance judgment passed during the judicial review of this case and the Supreme Court judgment reviewing the final second instance judgment in almost all of its decisions prior to 2010—I shall review the case mentioned and the related court judgments in more detail below.

Given the fact that, due to the diversity of the protected community, the decisions of the media authority related to hate speech[86] cannot be presented in a grouping according to the subject matter, I have selected cases related to the issue of the establishment of the broadcaster's liability, ie, the accountability of the broadcaster in respect of distancing itself, within which I have not applied any further differentiation on the basis of whether the various offences constituted incitement to hatred, offensive speech or exclusion. In respect of the legal provisions prohibiting the publication of hate speech,[87] the establishment of the objective responsibility of the broadcaster is subject to special criteria, since broadcasters may only be held liable for hate speech in the content published by them if such content is published without counterpoint, control and moderation and the broadcasters fail to distance themselves clearly and distinctly from the content.

In respect of the examination of whether the broadcasters have distanced themselves from the hate-mongering, venomous, discriminatory content, and, consequently, whether their liability may be established for violation against the media law prohibition of hate speech, the decisions of the media authority are mixed. A number of decisions passed during the early phases of the authority's application of the law did not dwell on the issue of distancing;[88] however, the vast majority of the decisions did examine this aspect, too, especially following the court decisions related to the above-mentioned ORTT decision No 1516/2003 (IX. 4.). I have classified the decisions examining the distancing of the broadcaster into the following groups, irrespective of the statements of facts related to the specific instances of hate speech:

85 Budapest Metropolitan Court judgment No 24.K.32382/2003/10., reviewing the ORTT decision No 1516/2003 (IX. 4.).

86 Among the communities affected by the legal violation are the Romanian nation, ORTT decision No 1185/2002. (VII. 18.); the Slovak nation, ORTT decision No 692/2010. (IV. 14.); the Jewish community, ORTT decision No 1470/2001. (X. 26.); the Roma community, ORTT decision No 117/2002. (I. 10.); persons affiliated with the political right, ORTT decision No 326/2005. (II. 17.); persons who could be affiliated with the political left, ORTT decision No 865/2008. (V. 22.); the Catholic Church, ORTT decision No 2210/2003. (XII. 4.); Christian believer congregations, ORTT decision No 52/2004. (I. 21.); the believers of Islam, ORTT decision No 1512/2009. (VII. 20.); members of the gay community, ORTT decision No 2500/2009. (XII. 16.); cyclists (who participated in the Critical Mass march), ORTT decision No 187/2006. (II. 1.); the Hungarian nation, ORTT decision No 1891/2007. (VII. 23.).

87 Article 3(1) of the Radio and Television Broadcasting Act: 'The content of the media service . . . may be determined freely; nevertheless, the media service provider . . . shall be liable for compliance with the provisions of this Act.' 21(1) of the Press Freedom Act: 'The media content provider, subject to the provisions of applicable legislation, shall make its decision on publishing the media content at its sole discretion and shall be responsible for compliance with the provisions of this Act.'

88 Decision No 1470/2001 (X. 26.) of the ORTT.

– the authority did not examine the issue of the broadcaster's distancing itself;
– according to the assessment of the authority, the broadcaster did not distance itself appropriately from the content published by it;
– according to the assessment of the authority, the broadcaster did not distance itself from the content published; moreover, the presenters themselves displayed hateful attitudes.

a. The Non-Examination of the Broadcaster's Distancing by the Authority

National Radio and Television Commission Decision No 1516/2003 (IX. 4.) and the Related Court Judgments

According to the statement of the facts of the decision on hate speech,[89] two segments of the political news programme of a public service radio broadcaster, a report and a journalistic commentary, had violated the legal provisions on the prohibition of hate speech. The first segment of the programme criticised the then current educational policy for the introduction of integrated education. The report, supporting the preservation of segregated education, depicted Roma children as anti-social, intellectually retarded pupils causing problems and conflict. The presenter's questions and commentary consequently contrasted this group, attributed with negative traits, with Magyar children. The opinion voiced by the teacher interviewed not only failed to contribute to reducing the already existing social divide and the betterment of the strata of society in a desperate situation, but actually contributed to reinforcing the attitude of exclusion towards the Roma minority. According to the position of the media authority, the statements uttered in the report were capable of increasing the negative prejudices, the hatred already existing in society against the Roma minority. Despite the fact that the interviewee took special care to avoid using the expression 'Roma', the questions and reactions of the presenter made it clear that the children in question were Roma. Bitterly characteristic of the severity of the prejudice against the Roma minority is the unfortunate phrase of the decision condemning the broadcaster, for aggravating *the already existing hatred* of society towards the Roma.

In the second part of the programme, a journalist's commentary was aired, in which the author responded to a previously published journalistic article. The journalist consciously chose a roundabout style, and used the conditional mood to voice his discriminatory and hateful thoughts about the Jewish community. He formulated his anti-Semitic propositions in such a manner as to avoid creating any tangible evidence of the infringement—he took painstaking care to avoid naming the minority in question; however, the context of his words made it perfectly clear to the audience that he was speaking about the Jewish community. The journalist accused Israel of following racist policies and described the Hungarian Jewish community as a group corrupting the Magyar community, and whose members are the cause of all hatred and the triggers of state violence. According to the position of the media authority, such a commentary had no place in Hungarian broadcasting, especially

89 Part I of the decision referred to the broadcaster condemning it for a violation against Article 3(2) of the RTBA prohibiting hate speech, while Part II established a violation against Article 23(2) of the same act, providing for unbiased and comprehensive information.

public service broadcasting; the ideas of the journalist had offended the feelings of the Jewish minority, and were capable of inciting hatred towards it, irrespective of what had elicited them. The media authority did not formulate any specific criteria in respect of the interpretation of the offence of incitement to hatred under media law, nor did it elucidate the difference between the criminal law and the media law standard.

In the lawsuit for the judicial review of the regulatory decision, the court of first instance amended the decision in respect of the journalistic commentary, and established the violation against Article 3(2) of the RTBA in respect of the educational policy interview only. The significance of the first instance judgment[90] in respect of jurisprudence was that this was the first ruling that tried to clarify the meaning of Article 3(2) of the RTBA prohibiting hate speech, and took the position that 'incitement against a community' as defined by Article 269 of the Criminal Code was not identical to or synonymous with 'incitement to hatred' as defined by Article 3(2) of the RTBA.

During the examination of the content of Article 3 of the RTBA, the court of first instance sought the answer to the question of what conduct may/should be qualified as an offence against the dignity of communities. The court searched for the answer in the context of fundamental rights; therefore, it primarily concentrated on the decisions of the CC, especially the fundamental decision CCD1, to which the media authority had also referred in the lawsuit. The court took the conduct defined by the CC as the basis of its reasoning ('in fact, incitement to hatred means the denial of the rule of law. It is the denial of the right to be different and the protection of minorities, denial of the resolution of conflicts without violence or threat of violence. Hence, it is an intolerant classification of the offended community, which is characterised by an aspiration to achieve a monopoly of opinion'), however, the court added that, with regard to media law offences, incitement to hatred is accompanied not by the high intensity of endangerment, but by the hypothetical element that is not sanctionable under criminal law but may be sanctioned under media law. Within the framework of this, the court tried to answer the question whether the forms of conduct sanctioned by the media authority had been capable of incitement to hatred. During the examination of the conduct of the broadcaster, the court found it necessary to refer to the jurisprudence of the European Court of Human Rights, too, as the Rome Convention, which has declared and (in Europe) prevailing purview, establishes rights that can be invoked by individuals and enforced by the Member States.

The court of first instance deduced the findings that should be considered in the present case, too, from the *Jersild* case. Although the facts of that case were different from the one tried by the court, the main question was the same in both cases—the Danish courts applied a criminal law sanction against a journalist for a television programme presenting the psychology of Danish neo-fascist organisations. The European Court of Human Rights ruled that the Danish decision had been contrary to the Convention because, according to the position of the court, the methods used by the given medium clearly indicated that the journalist rejected and distanced himself from the representatives, ideas, and mentality of the neo-fascist organisation.

The Hungarian court of first instance also found this aspect to be of primary importance in the case under examination, and it was on the basis of this that it ruled that as the journalistic

90 Budapest Metropolitan Court judgment No 24.K.32382/2003/10.

commentary had been written in reply to another piece of journalism, its author had used the conditional mood throughout the article, and had rejected the contents of the commentary by a declarative sentence both at the beginning and the end of the article, had not committed the offence of incitement to hatred. In respect of the educational policy interview, however, the court established that the broadcaster had committed the legal offence in relation to the Roma minority, as the work had been capable of incitement to hatred, especially at the level of local communities and the place where it had been made. The broadcaster had not distanced itself from the expressions capable of incitement to hatred against the Roma community; on the contrary, it had been precisely those statements made by the presenter that had rendered the community offended in its dignity clearly identifiable.

The Budapest Court of Appeal, proceeding as court of second instance,[91] did not alter the first instance decision on the merits in respect of the violation against the prohibition of hate speech, but disagreed with its reasoning. According to the court of second instance, the journalistic commentary read over the radio should have been adjudged exclusively on the basis of its content, without reference to the mentality of its author or the fact that it had been written in reply to another piece of media content. Assessing the content of the commentary, the court concluded that its formulation was general, enigmatic, and difficult to grasp, and the enmity it suggested was insufficient to establish the legal offence.

The Supreme Court reviewed the final judgment within the framework of an extraordinary remedy procedure, annulled the part of the judgment of the Budapest Court of Appeal, and maintained the effect of the original regulatory decision.[92] By the reasoning of the court, the argument of the plaintiff, according to which a violation against the prohibition of hate speech can only be established 'if the facts of the case involve the generation of extreme and hostile sentiments,' had no legal grounds. According to the position of the court, such exaggerated, maximalist interpretation was not deducible from either the specific provision in question or the interpretation of the other provisions of the law. During the examination of the content of the commentary, the court sought an answer to the question whether it was in violation of human rights and capable of incitement to hatred. In relation to this, the position of the court was that the commentary was the work of a journalist, and contained the personal ideas and opinions of that journalist, which should be interpreted in their conceptual totality. On the basis of the text broadcast by the radio, despite the use of literary irony, satire, and the conditional mood, the commentary had violated Article 3(2) of the RTBA, because its author had consciously and in covert form voiced thoughts capable of incitement to hatred, violating human rights as well.

The judgment of the Supreme Court referred to has also been published as a Court Decision (BH) of outstanding theoretical importance under No BH2006. 270. The primary purpose of Court Decisions is to provide guidance (precedent) on cases especially interesting and problematic in respect of the application of the law.[93] Although the BH2006. 270. is primarily concerned with the criteria of balanced coverage, as the second part of the decision

91 Budapest Court of Appeal judgment No 2.Kf.27.098/2004/6.

92 Supreme Court Kfv.IV.37.142/2005/5.

93 Citing precedents is a frequent component of the process of legal interpretation. It has several legal sources, such as decisions ensuring uniformity, court decisions, position statements of the college of judges, CC decisions, as well as the 'established judicial practice'.

of the ORTT sanctioned the broadcaster's violation of these, its above-cited statements on hate speech are also significant, which is why this court decision has been referred to by the media authority in almost all subsequent decisions related to hate speech.

b. Inadequate Distancing by the Broadcaster

Under this heading, I classify those legal cases where the broadcasters tried to distance themselves from communications containing hate speech that they have published; however, their attempt to achieve this was unsuccessful, inadequate or illusory.[94]

Decision No 2844/2007. (XII. 12.) of the ORTT suspended the station's broadcasting right for a period of 5 minutes on the basis of a breach contravening Article 3(2) of the RTBA. On the basis of a citizen's complaint, the authority examined a national commercial television station's morning show, in which an interviewee of the programme's host made several anti-Semitic comments capable of arousing hatred, and slandered the Jews on the basis of bogus facts. The presenter tried to keep the interview under control, but was unsuccessful, and could not uphold the rules demanded by the situation or force the interviewee to be moderate. In this way, the anti-Semitic views presented as facts by the interviewee, quotes and half-truths from an inaccurate translation of the Talmud and offensive false statements that were capable of inciting hatred against the Jewish people, were broadcast live in the programme.

The broadcaster applied for legal remedy against the decision of the authority; the court of first instance accepted the claim of the television station.[95] The first instance judgment annulled the decision of the authority. The court based its reasoning on the statement of the CC decision 46/2007 (VI. 27.), according to which the authority could only establish a violation against principled provisions of the RTBA if the broadcaster were continuously promoting an ideology contemptuous of the basis of the constitutional order, the equal dignity of all human beings; that is, if the plaintiff engaged in such conduct in several of its programmes, regularly and for a protracted time (for several days, weeks or months). With respect to this, the court found that the authority had been overly strict in its interpretation of Article 3(2) of the RTBA, and annulled the decision.

The court of second instance, proceeding on the basis of the appeal filed by the authority, annulled the first instance judgment, and rejected the television station's claim.[96] According to the position of the court of second instance, the general and conditional sentences in the reasoning of the CC decision used as examples cannot serve as grounds for annulling the regulatory decision. The broadcaster is required to meet the legal obligations related to respect for constitutionally protected values and human rights, both in respect of the entire programme flow and the individual programmes and parts thereof. Even if only a certain programme or programme segment of a broadcaster is in violation of Article 3(2) of

94 An example of illusory distancing is the case described in decision No 865/2008 (V. 22.) of the ORTT, where the TV presenter's choice of words, intonation, and mimicry all led viewers to believe that the presenter agreed with the hate-mongering caller ('Come now, Joseph, it's really frustrating that we are talking about this stuff in 2008, right?'; 'OK, look, I have to protest against that...'; 'So, in my official capacity, I have to distance myself from this lamp-post stuff, OK?'

95 Budapest Metropolitan Court judgment No 20.K.30.321/2008/13.

96 Budapest Court of Appeal judgment No 2.Kf.27.555/2009/4.

the RTBA, the broadcaster's liability may be established and sanctions may be imposed. In relation to this, the court referred to the case law of the Supreme Court as well.[97] Such an interpretation would greatly restrict the possibility of holding perpetrators liable for violations against the principled provisions of the law; however, no such intention can be attributed to the legislator on the basis of the RTBA. The result of such a restrictive interpretation would be that expressions and opinions openly or covertly offensive to minorities or aimed at their exclusion or presentation or condemnation on a racial basis could not be sanctioned if only presented on a single occasion for a short time; this would be contrary to both the regulatory system of the RTBA and the existing jurisprudence.

The court of second instance found the authority's intervention for the protection of the group interest to be legitimate; the authority's assessment programme and the individual utterances in it had been correct. After viewing the part of the programme in question, the court of second instance adopted the position of the authority, according to which the reporter had been unable to check the interviewee's speech that had been based on false statements and distorted facts, had been injurious to human dignity, and capable of arousing hatred towards the Jewish people and members of the Hungarian anti-fascist organisation, as well as the reporter had failed to distance himself from it; this had been capable of leading television viewers to give full credence to the interviewee's opinions. The court stressed that Article 3(2) of the RTBA did not make the establishment of infringing conduct conditional upon the existence of criminal law liability. The fact that the criminal law definition of the offence requires the existence of a larger number of factual elements does not preclude the application of different criteria with regard to broadcasting.

The television statement applied for legal remedy against the final judgment; however, the Supreme Court conducting the judicial review confirmed the second instance judgment. According to the position of the court, the final judgment had been appropriately thorough in recording the facts of the case, and reached a correct conclusion on their basis by applying the relevant legal provisions. The Supreme Court stressed that the categories of criminal law cited by the broadcaster during the lawsuit had no relevance to the assessment and judgment of the case. The court found the position of the television station, trying to interpret the legal provision when confined to cases where the highly strung emotions of the participants threaten physical conflict, to be strained and exaggerated. This interpretation, however, is unacceptable, as Article 3(2) of the RTBA is clear in prohibiting the capability of incitement to hatred in the instances defined there. The court also shared the reasoning of the final judgment, according to which the provisions of the RTBA do not indicate that the legislator had intended to make the sanctionability of expressions violating constitutional values dependent on the length and timing of such expressions. The perpetration of the infringement is not conditional upon any continuity, repetition, or regularity; a single instance of infringing conduct must be sanctioned, too.

c. Presenters' Hate-Mongering—The 'Echo TV Phenomenon'

The majority of condemnatory decisions issued against broadcasters for representing hateful opinions lead us to conclude that the infringing programmes examined have certain typical,

97 Supreme Court judgments Kf.VI.38.474/2000/3, Kfv.IV.37.142/2005/5, and Kfv.III.37.445/2007/5.

common traits. One of the most typical characteristics of these programmes is that they convey world views, which the producer wishes to gain acceptance. The programmes depict various topics related to the Jewish and the Roma minorities, other nationalities, politicians, or homosexuality within a specific conceptual framework, through a 'filter' of sorts. To influence the audience, the broadcasters use the method of splitting up the participants of society, politics, and the economy into two markedly distinct groups, ie, those who are not on our side are against us. This simplified dualism, that is easily understandable by the man in the street, too, provides the audience with a key to the solution to all situations, and the delight of unmasking and denouncing the scapegoats. In this extremely simplified situation, the ideology of the broadcasters is presented as suffering eternal persecution and oppression; the broadcasters intentionally kindle and keep this sense of oppression ablaze, suggesting that the time is ripe to unite and take action to brighten fate.

The presenters do not even try to remain impartial as facts are not separated from opinions; the audience is given no chance to form its own opinion free from influencing—instead, the position of the broadcasters is presented as a part of the information conveyed, thereby predestining how the audience receives it. They invite guests to the programmes, and direct the conversation with their questions and comments in the manner they believe is best suited for propagating their own ideology. The conversations with members of the audience calling the programme also enable to presenter to determine the direction of the conversation. An excellent example of this is replying with a question which contains a value judgement and contains the answer, too. Accordingly, the programmes are biased and one-sided; they provide no opportunity for real or presumed adversaries to refute the accusations and protect their convictions, or even to react to the theories which the presenters communicate as self-evident.[98]

The overwhelming majority of the decisions described above were related to a single broadcaster, Echo Hungária Zrt., the operator of Echo TV.[99] Accordingly, the following cases are related to various Echo TV programmes. The secondary criterion of selection was that all of the regulatory decisions analysed below underwent judicial review.

The first decision concerning Echo TV was the ORTT decision No 1949/2008 (XI. 5.); the authority imposed a fine of 100,000 forint upon the broadcaster for a breach against Article 3(2) of the RTBA. The programme subject to the regulatory supervision contrasted the Roma segment of the rural population with the non-Roma, depicting the former in a biased manner as an aggressive, sexually prolific, carousing group with a criminal lifestyle. The programme suggested that the group's only legal sources of revenue were the various forms of benefits; according to the presenter, these provided a better standard of living than that of certain strata of the population whose members had regular jobs. The injustice referred to and the antisocial conduct of the Roma aggravate the conflict between Magyars and the Roma; in the opinion

98 The authority provided a general description of broadcasting expressly supportive of hateful content in its decision No 117/2002 (I. 10.) in relation to the programmes of Pannon Rádió. These statements, however, may be regarded as applicable to the decisions presented in the present subsection.

99 Decisions condemning Echo Hungária TV are Nos 865/2008 (V. 22.), 866/2008 (V. 22.), 1949/2008 (XI. 5.), 1995/2008 (XI. 5.), 1996/2008 (XI. 12.), 1009/2009 (V. 20.), 1010/2009 (V. 20.), 2499/2009 (XII. 16.), 2500/2009 (XII. 16.), 633/2010, 692/2010 (IV. 14.) of the ORTT; decision No 1153/2011 (IX. 1.) of the MC. Decisions sanctioning other broadcasters are Nos 117/2002 (I. 10.) (Gidó Média Kft. – Pannon Rádió), No 1480/2009 (VII. 16.) (Budapest Televízió Zrt. – Budapest Televízió); Media Council decision No 828/2011 (VI. 22.) (Arlói Jóléti Szolgálat Közalapítvány – Arló TV) of the ORTT.

of the presenters, the victims will take the law into their hands and avenge themselves, because public administration is unable to manage the problem, and both police and social solutions have failed. The programme did not even try to depict the problem in an objective and equitable manner; no mention was made about the injuries and attacks suffered by the Roma. The attitude of the presenter towards the Roma was authenticated by the presentation of the contrast between the Roma and the Magyar population entrapped in impoverished small settlements. According to the position of the authority, the presenter's generalising, scapegoat-hunting depiction of the situation could have contributed to reinforcing social conflicts and prejudice against the Roma. The authority found it especially problematic that the presenter suggested that a violent resolution of the conflict was inevitable, as this could serve as legitimation for the actions of groups preferring the aggressive settlement of the hostilities. The authority cited the definition of incitement to hatred formulated in the CCD1, and concluded that the attitude of the broadcaster in question had amounted to incitement to hatred in the sense of that definition.

In the judicial review proceedings initiated by the broadcaster, the court of first instance proceeding in the case rejected the plaintiff's claim.[100] The court passed judgment after viewing the programme and holding the trial, emphasising that the concept of incitement to hatred used by the RTBA is stricter than the criminal law concept of instigation of hatred, therefore it allows the establishment of infringements of rights within broader limits. The court referred to the Supreme Court's *ad hoc* decision BH2006. 270. (analysed above), according to which the argument that a violation against Article 3(2) of the RTBA can only be established 'if the facts of the case involve the generation of extreme and hostile sentiments'. On the basis of the video recording viewed and the reasoning of the regulatory decision, the court established that the authority's assessment of the programme had been thorough and comprehensive. The court fully shared the assessment of the authority, and only found a few amendments necessary in respect of the contents of the plaintiff's application. By contrast with the reference made by the plaintiff, the court stressed that the offence provided for in Article 3(2) of the RTBA consists of endangerment, ie, the establishment of the offence does not require that it results in an actual violation of interest; the possibility of the connection between what is said in the programme and incitement to hatred is sufficient for the establishment of a violation against the legal provision referred to.

In respect of the plaintiff's claim that, in the programme, the distinction between majority and minority did not appear as a distinction between the Roma and Magyars, the court pointed out that the interviewed persons and the expressions of the presenter made it clear to the viewers that the minority, whose conduct the majority of society will not tolerate any more, and will take the law into their own hands, was the Roma. On the basis of what had been said in the programme and the manner of its editing, neither the cynical outlook, nor the conditional mood of formulation, the creation of a semblance of objectivity by using scientific reasoning (the invitation of an economist to the programme) or the use of expressions indicating neutrality ('it does not matter whether they are Gypsies or not') exculpate the presenter from the qualification of the programme as contrary to Article 3(2) of the RTBA. The comments and expressions in the programme that were found to be objectionable by the authority further aggravated existing social conflicts and prejudice towards the Roma minority and were capable of incitement to or instigation of hatred against that minority.

100 Budapest Metropolitan Court judgment No 24.K.30.127/2009/5.

Similarly, decision No 1009/2009 (V. 20.) of the ORTT suspended the broadcasting right of the broadcaster for a period of 60 minutes for a violation against Article 3(2) of the RTBA. The broadcaster applied for legal remedy against this and the subsequently regulatory decisions, since the suspension of transmission time is one of the most severe sanctions for a television station. According to the decision's statement of the fact, infringing communications had been broadcast in one of Echo Television's interactive (call-in) programmes. In the episode examined, the presenter—a 'verbal warrior' according to his self-definition—formulated opinions and published text messages that were contrary to the right of equal human dignity due to all citizens and the constitutional order, and were intended to incite hatred against the Roma and politicians in office. The authority emphasised that the expression of opinions by viewers was not the subject of its procedure, but only the conduct of the broadcaster, ie, the selection of what opinions it publishes in the programme.

According to the position of the authority, such expressions may not be published without restriction, and the broadcaster has special responsibility in situations when it is not merely a passive vehicle of messages inciting or threatening violence against the Roma and government politicians, but actively promotes the pronounced formulation of such messages rather than clearly distancing itself from them. The idea of civil war or a war of self-defence were presented in the programme as possible solutions to the problems of the country and the conflicts of society, whereby the broadcaster had committed a severe violation against the constitutional ideal of the democratic rule of law, as well as the first phrase of Article 3(2) of the RTBA, according to which 'programme providers shall operate with respect to the constitutional order of the Republic of Hungary'. The authority took a firm stand in favour of the position that the restriction of the freedom of opinion is legitimate in cases when the broadcaster publishes opinions and messages which incite or threaten violence. According to the authority's finding, the programme had been capable of arousing hatred against the Roma and government politicians.

The broadcaster applied for the review of the decision. As the first step of this procedure, the court of first instance ordered the authority to annul the decision and to conduct a new procedure.[101] The court found that the authority had committed major procedural violations affecting the decision of the case on the merits. One such violation committed by the authority was that the operative part of the decisions had failed to indicate the date and the precise time of the programme in respect of which the broadcaster had committed the breach.[102] In the reasoning of the selection of the sanction to be applied, the court also assessed as a severe procedural violation of the fact that, although the authority had listed five previous decisions where it had already applied sanctions against the broadcaster, it also referred to other legal violations committed by the broadcaster in respect of which no decision had been brought yet. The court passed its decision on the basis of the aforementioned two procedural violations; consequently, it passed no decision on the merits of the case.

The court of second instance proceeding on the basis of the appeal filed by the authority confirmed the decision of the court of first instance with final effect.[103] In the judgment, it

101 Budapest Metropolitan Court judgment No 20.K.32.196/2009/24.

102 It should be noted that it was contradictory to record that the court established that the decision did not specify the date of the offence, but the authority made no reference to this in its appeal.

103 Budapest Court of Appeal judgment No 4.Kf.27.405/2011/3.

expounded that the court of first instance had established the facts of the case correctly, and the conclusion drawn from those facts conformed to the applicable legal regulations and the governing judicial practice. However, the court of second instance supplemented the decision of the court of first instance found to be correct on the merits with the provision that if, as a result of the repeated procedure, the authority passes a condemnatory decision against the broadcaster and orders, among the sanctions imposed, that an announcement be published about the fact of the legal offence, the text of the announcement must state precisely the programme whereby the broadcaster had committed the violation.

In the repeated procedure, the authority passed a decision in March 2012,[104] establishing that, by way of the programme under examination, the broadcaster had not committed a violation against the legal provision on respect for the constitutional order and the prohibition of the publication of content capable of incitement to hatred. Given the fact that this decision was passed after the introduction of the application of the higher media law measure, I shall present it in the next main section.

Decision No 1010/2009. (V. 20.) of the ORTT was passed on the same day as the previously reviewed decision; the authority established a violation against Article 3(2) of the RTBA on the basis of a similar statement of the facts, the broadcasting right was suspended for 60 minutes in this case, too, and the authority reasoned for the chosen sanction along the lines of identical arguments, however, the legal fate of this decision turned out to be quite different. Although viewers' opinions were not broadcast in the programme subject to the procedure, the communications made by the presenter's conversation partner were capable of inciting violent sentiments and hatred against the Roma, and accused Israel of conspiring against the Hungarian state. According to the firm opinion of the authority, unsubstantiated information, hearsay, and conjectures were formulated on the screen in such a way that their only purpose was to reinforce the idea of a connection between the government, 'Gypsy crime' and the Israeli secret service. The presenter of the programme accepted the guest's propositions at face value without any criticism whatsoever, fully identified with them and actively elicited some of the information. The imminent possibility of civil war was raised by the presenter in support of the theory that all this was in the interest of the government and Israel. According to the position of the authority, the programme had called Hungary's constitutional system into doubt by identifying a conspiracy behind the conflicts of society, between the Hungarian government and the Israeli secret service. Failing to comply with the requirement of equal respect for the dignity of all human beings, the programme expressed opinions so extreme that they went beyond the limits of the freedom of opinion, because the presenter did not even try to question them. In the programme the presenter's comments and lack of appropriate moderation accomplished an atmosphere capable of inciting hatred. On the basis of the above, the authority concluded that the statements made in the programme had been in violation of Article 3(2) of the RTBA, because they had been capable of inciting hatred against the Roma and the Jewish minorities by presenting the activity of the aforementioned groups as the cause of Hungary's situation, the economic and political problems and the increase in crime.

The first instance court conducting the review of the decision upon the request of the broadcaster did not find such severe procedural violations on the part of the authority

104 Decision No 582/2012. (III. 28.) of the MC.

that could have resulted in a decision similar to the previously mentioned first instance judgment passed a year later.[105] After viewing the video recording of the programme, the court adjudged the claim on the merits, too. The court admitted the authority's position according to which the statements made in the programme called into doubt the prevalence of the democratic rule of law, the constitutional order and human rights in Hungary. The court held the statements to be capable of influencing public opinion in the direction of attributing the social, political, and welfare problems of Hungary to these causes, and to elicit extreme reactions and attitudes. Furthermore, the court found that the presenter of the programme had accepted the statements of the guest without any criticism; in fact, both the words of the presenter and the editing technique of the programme had been in approval of these statements, and the presenter had failed to distance himself from the unsubstantiated statements and extreme opinions. The court stressed that the freedom of speech and the freedom of the press were, beyond doubt, among the most important constitutional fundamental rights; however, their exercise may not result in illegal conduct and may not serve as incitement to hatred. The court referred to the position of the CC, too, according to which the social force and influence on public opinion of statements made in the media is extremely strong and intensive; in practice these constitute the most important source of information, therefore their effect on people's thinking and conduct is extremely strong. The court rejected the claim of the plaintiff on the basis of the reasoning summarised above.

The court of second instance proceeding on the basis of the appeal filed by the plaintiff repealed the first instance judgment, and ordered the first instance court to conduct a new procedure.[106] The reason for the decision was that, according to the court of second instance, the first instance court had committed certain procedural violations; eg, it had not adjudged certain motions for evidence submitted by the plaintiff and had not assessed all of the reasons of the claim. In the repeated first instance procedure, the court annulled the decision of the authority partially, in respect of the legal sanctions, and ordered the authority to conduct a new procedure.[107] During the repeated procedure, the court maintained its position that the authority had assessed the programme appropriately, on the basis of coherent and rational inferences and that the broadcaster had indeed committed the offences identified by the authority. In respect of the provisions of the regulatory decision reasoning for the sanctions applied, however, the court found that the reasoning had been incomplete and inconsistent to such an extent as to render it unsuitable for review on the merits. The reason for this was that the authority had referred to presumed offences which it had not adjudged. Nor did the decision provide the reasons for the authority finding the sanction of a 60-minute suspension to be necessary for achieving the desired prevention. Furthermore, the decision had failed to indicate the legal provision upon which the obligation to publish the announcement was based.

The authority filed an appeal against the first instance judgment described above, as a result of which the court of second instance partially amended the first instance judgment and repealed only the provision of the decision prescribing the publication of

105 Budapest Metropolitan Court judgment No 3.K.32.312/2009/11.
106 Budapest Court of Appeal judgment No 4.Kf.27.391/2010/12.
107 Budapest Metropolitan Court judgment No 3.K.30.219/2011/8.

the announcement.[108] The court of second instance found that the court of first instance had reached an incorrect conclusion on the basis of the trial data available when it deemed the decision's reasoning for the selected sanction to be in violation of the law. When defining the type and measure of the sanction to be applied, the authority has discretion; the law does not prescribe either privilege of order or progressivity for the authority in this respect; however, the authority is required to inform the client about its discretionary considerations. According to the court, the authority had met this obligation, and the court did not identify any deficiencies or legal violations in respect of the authority's compliance with its obligation to provide the reasons for its decision. In respect of the sanction applied in parallel with the suspension of the broadcasting right, the order to publish the announcement, however, the court referred to judgment No Kfv.III.37.400/2011/8 of the Curia passed in the meantime, according to which the broadcaster is free to specify the manner of informing the audience. It would be an excess prejudice to the broadcaster if, besides the suspension, the announcement were required to state the precise legal offence for which the sanction was imposed.

The broadcaster submitted a petition for the judicial review of the final judgment. As a result of the extraordinary remedy procedure, the Curia confirmed the effect of the final judgment.[109] According to the position of the Curia, the court of second instance had recorded in the reasoning of its judgment the facts of the case with appropriate thoroughness and had reached a correct legal conclusion from the said facts by applying the relevant legal provisions. The fact that besides referring to specific adverse decisions, the authority mentioned certain presumed legal offences committed by the broadcaster in the reasoning of the decision which the authority had not adjudged yet, did not render the application of the selected legal sanction unjustified. The authority had complied with its obligation to apply discretion, and had provided a detailed account of this in the reasoning of the decision. The final judgment had not been in violation of the legal provisions referred to in the application for judicial review; therefore the Curia maintained its effect.

In summary, we may conclude that, similarly to the jurisprudence of the constitutional court and criminal law practice that have crystallised over the past decades, the current practice of the authority interprets the freedom of speech very broadly, and provides protection even to opinions that are injurious to or arouse hatred against others. Since 2012, in Hungary the media authority has granted solid and increased protection to the freedom of speech also in respect of the appearance of hate speech in the media and, in parallel with this, the dignity of the individual members of the communities suffering injuries has been relegated to the background.

The freedom of expression and, within that, the freedom of speech are, beyond doubt, very important democratic values; however, the values of human dignity and respect for the rights of others are at least as important. According to the hopes of the present author, Hungarian law enforcement bodies will soon recognise that the legitimate restriction of the freedom of speech may be justified and will find the correct balance between the conflicting interests.

108 Budapest Court of Appeal judgment No 2.Kf.27.302/2012/5.
109 Curia judgment No Kfv.III.37.019/2013/6.

ii. Application of the Higher Media Law Measure (2012–)

In May 2010, the ORTT ceased to function as the mandates of two of its members expired. The Media Council, established on the basis of the new media law regulations, commenced operation in October 2010, therefore it had to process 5 months' backlog of cases. The first two decisions of the Media Council passed in relation to hate speech continued the practice established by the ORTT, making a distinction between the measures of criminal law and media regulation in the reasoning of the decisions.[110] On the basis of the jurisprudence of the CC and the Supreme Court, the Media Council's position was that it is possible to impose media law sanctions on the basis of the media law norms prohibiting the publication of hate-inciting content.

However, after the CC decision No 165/2011 (XII. 20.) was adopted, the Media Council passed no decisions condemning broadcasters for violations against the media law provisions on the prohibition of hate speech. As opposed to the previous decisions of the ORTT related to the same programmes, the procedures initiated *ex officio* against audiovisual media service providers were either concluded with the establishment of the absence of the alleged infringement by the MC,[111] or the MC did not pass condemnatory decisions in the repeated procedures resulting from court judgements. The legal cases analysed below serve to illustrate the current practice of the media authority, which grants broader protection to the freedom of speech than previously. Since no relevant court decisions have been passed, the jurisprudence of the courts in relation to regulatory decisions cannot be examined.

The first MC decision in which the authority applied a significantly higher measure in respect of the possibility of the restriction of the free speech was the result of the repeated procedure in the Echo TV case analysed in the previous chapter. The Media Council's decision No 582/2012 (III. 28.) passed in the repeated regulatory procedure which replaced the ORTT decision No 1009/2009 (V. 20.) which had been annulled by the court, found—by contrast with the earlier ORTT decision—that by broadcasting the programme under examination the broadcaster had not committed an infringement against the legal provisions on respect for the constitutional order and the prohibition of the publication of content capable of inciting hatred.

In its reasoning, the authority referred to judgment No 24.K.35.632/2006/2 of the Budapest Metropolitan Court, according to which the RTBA does not provide for the concept

110 Media Council decision No 828/2011 (VI. 22.) imposed a fine upon the Arló Welfare Service Foundation for utterances made in a programme of the local television operated by it, Arló TV, with respect to an infringement of Articles 3(2) and 3(3) of the RTBA. The programme depicted the Roma minority and all of its members as second-rate citizens, incapable of peaceful coexistence in society. The Media Council attributed significant gravity to the infringement because the programme had been capable of the direct violation of human dignity and inciting hatred against the Roma ethnic community and presented coarse verbal content (eg, genetic thrash unworthy of the human name; parasitic, good-for-nothing, lazy thieves; bunch of leeches, protozoans, etc.). In this case, the MC decision No 1153/2011 (IX. 1.) sanctioned the broadcaster Echo TV with a fine for infringement of Article 17(1) of the new media act, the PFA. The programme examined by the authority depicted the Gypsy minority collectively as an over-supported group of parasites living on aid, whose members have no respect for the norms of society, engage in criminal conduct and terrorise the Magyars feeding them. According to the presenter the Jews are behind Gypsy terrorism, and they use the Gypsies as their weapon against the Magyars. A specific threat was uttered in the programme, namely that if the Gypsies and the Jews carry on with the anti-Hungarian machinations attributed to them by the presenter then they will have to leave the country.

111 Besides the MC ruling No 1640/2012 (IX. 12.) analysed below, see also decision No 925/2012 (V. 23.) in which the MC decided not to initiate a procedure against the public service television in relation to a documentary about the Roma community it had broadcast. According to the body, the much disputed programme was not capable of inciting hatred or exclusion against the Roma community.

of constitutional order, therefore its content has to be determined by way of constitutional interpretation. According to the interpretation of the court, the concept of constitutional order includes all fundamental rights and the institutional protection duties of the state related to the exercise of such rights, the relationship between the state and the citizen built on mutual rights and obligations and the entire political system with its principles of operation, legal order, and institutions. Those, therefore, who profess an ordering principle different from the constitutional 'order', who dispute the principles determining the operation of the system of the state and the necessity of its institutions, or call the fundamental rights and the institutions required to ensure their prevalence into doubt call the entire constitutional system into doubt.

According to the position of the Media Council, in the programme found objectionable, the presenter had not called into doubt the fundamental rights or the institutions ensuring their prevalence and had not discredited the ordering principles and institutions of parliamentary democracy. The presenter's criticism of the government in power and the period under its rule and his raising the idea of civil war ('because to my mind there is a civil war going on in Hungary today') did not result in an infringement against the respect for the constitutional system, nor did it entail that the television had called the rule of law into doubt. With respect to this, the Media Council established that the broadcasting of the given programme by the media service provider had maintained respect for and had not infringed the constitutional order of the Hungarian Republic.

In respect of the expressions in the programme related to politicians in power, the MC referred to the conclusion of CCD1, according to which open objections, incisive judgement and criticism or offensive statements do not qualify as incitement to hatred and, furthermore, quoted the finding of the CC decision No 1/2007 (I. 18.) according to which 'the challenged paragraph of the MA does not mean that disputes or criticism have no place in radio and television programmes, or that the pluralism of opinions should not appear in such programmes. The purpose of the provision is to prevent radio and television from becoming amplifiers of the offensive, racist expressions of hate-mongers inciting exclusion from society and discrimination.'

In this instance, the authority had also taken into account the provisions of the CC decision No 36/1994 (IV. 24.), which emphasises the freedom to criticise public figures.[112] The Media Council also highlighted the conclusion of the CC, according to which the category 'various groups of the population' in Article 269 of the Criminal Code (incitement against a community) is to be understood to denote 'persons distinguished by different world views (members of parties, associations, movements, etc.) or basically by any other characteristics' on

112 Constitutional Court decision 36/1994 (VI. 24.): 'It follows from the positions taken so far in the decisions of the Constitutional Court on the constitutional value of the freedom of expression and the freedom of the press, as well as the significant roles they fulfil in the life of a democratic society, that this freedom requires special protection when it relates to public matters, the exercise of public functions, and the activity of persons with public tasks or in public roles. With regard to the protection of persons taking part in the exercise of public authority, a narrower restriction on the freedom of expression corresponds to the constitutional requirements of a democratic state under the rule of law. Open discussion of public affairs is a requisite for the existence and development of a democratic society which presupposes the expression of different political views and opinions, and the criticism of the operation of public authority. As the experience of societies with democratic traditions shows, in these debates governments and officials are attacked by unpleasant, sharp, and possibly unjust accusations, and facts are revealed to the public which are capable of offending the honour of public figures. According to the position of the Constitutional Court, the possibility of publicly criticising the activity of bodies and persons fulfilling state and local government tasks; furthermore, the fact that citizens may participate in political and social processes without uncertainty, compromise and fear is an outstanding constitutional interest.'

condition that such an extension of the concept of 'community' cannot render it impossible to apply the rule by being overly general (ie, the 'distinction' must be real and sensible).

With respect to the above, on the one hand the authority found it questionable whether, in the case of government politicians and the proponents of the given political side, there exists that 'attribute that is a part of the essence of personality' by virtue of which they would qualify as a group protected by the legal provision. On the other hand, the Court clearly stated that the injurious and extreme positions voiced in the programme by either the viewers or the presenter, strongly critical of the work of the government in power at the time, were not capable of inciting hatred. According to the approach of the authority, freedom of opinion and the freedom of the press as requisites of democratic publicity include the possibility of the publication of injurious or even extremist positions. Tolerance towards extreme or injurious opinions furthers the efficiency of democratic debate.

According to the position of the media authority, the heated comments uttered / broadcast in the programme ('Only the death penalty would do any good to these murderers!'; 'good-for-nothing, thieving scum, murderers'; 'it's high time to cleanse our country of the rabble', etc.) were born from outrage; however, in sharp contrast with the finding of the ORTT in the case, did not incite the violent resolution of conflicts, and were not intended to raise hostile emotions in others. In so-called opinion programmes, the position of the presenter is similar to that of the viewers calling the studio; they speak to each other, and amplify each other's views. It was the sense of solidarity and common values that elicited the expressions of (mostly) political opinions in the programme, which did not reach the level of hate speech.

In respect of the topic related to the issue of the Roma and the Kiskunlacháza murder, the authority established that, in fact, no utterances or comments had been made that overstepped the threshold of racial exclusion or hatred and no qualifications had been made about the Roma community that resulted in the distortion of a social issue by holding them to be second-class citizens. The comments on the positive discrimination towards police officers of Roma origin, the remark that 'there is a folk saying that a single Gypsy is not a man, the Gypsies are only strong if there are ten of them against one' or the adjective 'Southern-Scandinavians' were uttered in a context which, although they did contain value judgements, did not deny the equal dignity of human beings, in this case the Roma, and did not qualify the Roma community in a way that transgressed the limits of democracy.

The Media Council decision made no mention about the other statements in the programme that were quoted by the ORTT decision as injurious to the Roma,[113] but established—on the basis of the above considerations—that the programme had not been capable of incitement to hatred against the Roma because its actual content did not constitute a violation against the constitutional order or incitement to hatred. Incitement to hatred, as the emotional preparation for violence, is an extremely severe offence; according to the MC, the programme had not been capable of eliciting such a reaction from the audience. Furthermore, the MC stressed that the freedom of the press protects excessive, offensive, injurious, and hurtful

113 According to the presenter, a traditionalist organisation, the Roma Guard, is already being recruited in Baranya County. Supposedly this organisation will organise theatre and concert visits for the Gypsies, however, the presenter doubted this. A viewer calling the show said that the Gypsies were amassing utility fee debts, and the presenter agreed with this. The presenter's vision of an approaching civil war was related to the Gypsies, as were the text messages of viewers according to which 'Only the death penalty could help these murderers'; 'Let's follow the example of Thailand and rid our country of this scum before they finally eradicate the Hungarians from the face of the Earth. Why are you so indifferent?!'

media content, too; therefore, in itself, the fact that the nature of a given piece of media content is such is not sufficient to establish a legal violation.

In the decision analysed above, the MC did not declare that it had adjudged the case using a more stringent measure than was customary in its previous practice. It was in order No 1640/2012 (IX. 12.) that the authority first declared that the CC decision No 1006/B/2001—which, in this respect, had been confirmed by the CC decision No 165/2011 (XII. 20.)—identified incitement to hatred under the media regulations with instigation of hatred under criminal law, and this measure leaves the authority with little margin for action.

In the case in question, it was upon a petition from the Commissioner for Fundamental Rights that the authority examined an investigative journalistic report programme of a broadcaster about the problems of the coexistence of the Roma and the Magyar population. The Roma citizens of the settlement, the victims of the thefts, the mayor of the settlement and representatives of both the opposition and the government were interviewed about the issue. Some of the victims of the thefts attributed the crimes against property to the Roma in general. The mayor opined that the Roma should be placed under permanent police surveillance, but he, however, had already identified the exact source of the problems, because, according to him, the burglaries and thefts were mainly 'committed by the new Roma families that came to live in the settlement'. The opinion of the leader of the local minority was similar; he too accused the new settlers of the violations against property.

As a result of the examination conducted, the authority established that the programme—besides being incapable of violating human dignity—had not incited hatred against the Roma community, and had not been directed at the exclusion of this minority, therefore no offence had been committed against the provisions of Articles 17(1) and 17(2) of the PFA.

In respect of the definition of the substance of incitement to hatred, the authority adhered to the definition of incitement to hatred formulated in CCD1 in the context of criminal law.[114] Furthermore, the authority referred to the reasoning of the CC decision No 1006/B/2001, which states, in respect of the legality of the restriction of the freedom of expression in relation to content inciting hatred, that 'Incitement to hatred is the denial of the right to be different, the denial of the protection of minorities; it is the emotional preparation of violence. It is an abuse of the freedom of expression; an intolerant classification of a certain group of human beings, a collectivity that is characteristic of dictatorships rather than democracies.' The Media Council also pointed out that disputes and criticism and the representation of the plurality of opinions are legitimate in radio and television programmes; however, radio and television should be prevented from becoming 'amplifiers' of the offensive, racist expressions of hate-mongers inciting exclusion from society and discrimination.

In conclusion to the theoretical argumentation briefly summarised above, the authority declared that the freedom of opinion and freedom of the press demanded by democratic

114 'According to Article 2(1) of the Constitution, the Hungarian Republic is a democratic constitutional state. The concept of democracy is an extremely complex one. In respect of the issue under examination, however, it is important that the right to be different, the protection of minorities and the waiver of actual or threatened violence as acceptable tools for the resolution of conflicts are part of the substance of democracy. Incitement to hatred is the denial of the above substantial traits, the emotional preparation for violence. It is an abuse of the freedom of expression; an intolerant classification of a certain group of human beings, a collectivity that is characteristic of dictatorships rather than democracies.' Incitement to hatred does not mean the expression of an unfavourable and offensive opinion, rather, it consists of expressions and 'virulent outbursts that are capable of whipping up such intense emotions in the majority of people which, upon giving rise to hatred, can result in the disturbance of the social order and peace.'

publicity encompasses the possibility of the publication of even offensive or extreme positions. Tolerance towards extreme or injurious opinions furthers the efficiency of democratic debate. Furthermore, in respect of whether a programme may be considered to be exclusive, the authority made it clear that content may be regarded as exclusive, if its communicator seeks to somehow prevent the members of a community from exercising their constitutional rights or to create obstacles to the exercise of their rights. In the end, such attempts prevent the equal right to dignity of members of such communities from being effective and enforceable.

The programme under examination, however, had not intended to depict the Roma minority as a group rejecting the norms of society. The Media Council saw no reason for regulatory action also because the programme wished to explore the social problems and their causes, and sought to find possible solutions, rather than disseminating content capable of aggravating the existing problems and to reinforce the isolation of the Roma minority by the majority of society. When assessing the legality of a piece of media content, it is of major importance if that piece of content is related to an important, much debated issue of public life. According to constitutional practice as well as the practice of both the authority and the courts, expressions related to such topics may be restricted to a lesser extent than other types of content.

On the basis of the above, the MC established that the programme in question had not only been incapable of violation of human dignity and incitement to hatred, but also of the exclusion of the Roma community, since it depicted only a part of that community in a negative light rather than the whole, and it did not attribute the condemnable phenomena to race or cultural disposition either (given the large number of positive examples presented). It is beyond dispute that the programme was provocative, stimulated debate and may have hurt the sensitivities of several people by dealing with a long disputed issue of public life and politics; however, according to the position of the authority, it is just such opinions that are protected by the right of the freedom of the press. Unable to uncover any legal violation during the detailed examination of the programme, the MC closed the procedure.

The most recent decision of the MC related to the topic was passed as a result of a repeated procedure in relation to the case of Echo TV analysed in the previous chapter. As opposed to the ORTT decision No 633/2010 (IV. 7.) annulled by the courts, the MC decision No 1270/2013 (VII. 24.) passed as a result of the repeated regulatory procedure established that the programme of the broadcaster under examination had not constituted a violation against the legal provision prohibiting the publication of content capable of incitement to hatred (Article 3(2) of the RTBA).

In the decision the Media Council stressed that 'incitement to hatred' provided for in the RTBA[115] and 'instigation of hatred' as provided for by the Civil Code effective at the time of the perpetration of the legal violation define similar delicts, ie, the measure applicable to the content examined is the same in both cases. At the same time, given the differences between the dogmatic system and the rules of liability of civil and public administration law, the conditions of the establishment of the legal violation (criminal act) are significantly different. That is, although the criminal law and the public administration law prohibitions of hate speech are, to some extent, parallel with each other, this does not mean that any content that is qualified to constituted a legal violation under one branch of the law will automatically qualify as such under the other and, conversely: the lack of a criminal offence under one branch of the law does not automatically entail relief from liability under the other.

115 Act IV of 1978 on the Criminal Code.

Following this, the authority defined the legal concept of 'incitement to hatred', citing the criminal code definition of CCD1 which treated 'instigation of hatred' as provided for in the Criminal Code as synonymous with 'incitement to hatred', which phrase does not appear in the text of the Criminal Code. The authority noted that the CC decisions Nos 1006/B/2001 and 165/2011 (XII. 20.) also regarded the two terms to be equivalent. According to the conclusion drawn by the authority, incitement to hatred does not mean the expression of an unfavourable and offensive opinion; rather, it consists of expressions, 'virulent outbursts that are capable of whipping up such intense emotions in the majority of people which, upon giving rise to hatred, can result in the disturbance of the social order and peace.' That is, the perpetration of incitement to hatred should not be examined as an 'abstraction'; by prohibiting the arousal of excessive enmity, ie, hatred, in others the law intends to preclude the danger of actual (physical, psychological, etc.) injury to the attacked communities.

According to the interpretation of the MC, the content under examination 'provokes / incites hatred' (in the sense of the Criminal Code), 'instigates to hatred' and 'incites hatred' (in the sense of the RTBA) if the opinion of the communicator is capable of arousing excessive enmity against the given community. Following this, the MC established that the legal object protected by criminal law is not identical to that protected by media law, for media regulations primarily protect democratic publicity and, through that, the communities suffering attacks rather than public law and order and the individual rights of the members of the injured communities. Democratic publicity is capable of accommodating many opinions that are unacceptable to a lot of people, ie, the freedom of opinion and the freedom of the press include the possibility of the publication of injurious or even extreme positions.

According to the position of the MC, fundamental rights may not be restricted on the basis of individual tastes or grievances, because tolerance towards extreme or injurious opinions furthers the efficiency of democratic debate. The freedom of the press may not be restricted on the basis of the rejection of extreme opinions. Only the intent to protect a fundamental right or constitutional value worthy of such protection, even against the freedom of the press may, form the basis for establishing the legal violation. The exercise of freedom of speech and the freedom of the press does not make the publication of opinions inciting hatred permissible; such opinions may be constitutionally barred from democratic publicity.

Based on the detailed examination of the programme, the MC established that the presenter's expressions in the programme (directed at the Ukrainian, the Slovak, the Romanian and the Serbian nations and Israel) cited verbatim above in italics had not been capable of incitement to hatred. Incitement to hatred involves the extreme and forceful expression of enmity against the given community or communities, which is capable of arousing similar sentiments in others, ie, it is an extremely severe offence. The Media Council established that the content of the programme—the cited sentences and the tone and structure of the whole of the editorial note—could not have elicited such sentiments from the viewers.

Furthermore, the MC also referred to the fact that the freedom of the press protects outrageous and injurious media content, too; therefore, in itself, the fact that the nature of a given piece of media content is such is not sufficient to establish a legal violation. The statements of the presenter about the Ukraine, Serbia, Romania, Slovakia and Israel were sarcastic and dishonourable, and may have been injurious to the members of the nations concerned, however, they were not capable of arousing the enmity or hatred of others. Over and above the individual sense of injury caused to the members of the community, they were incapable of rousing such hatred on the side

of the recipients that could later on lead to a legal violation against the community. The gravity of the expressions in the editorial note did not reach the level of incitement to hatred.

VII. Limitation of Press Freedom in the Information Service of the Media, with Special Regard to Balanced Coverage Requirement

A. Requirement of Balanced Coverage in the Service of the Freedom of Speech and Information

The requirement of balanced coverage—a concept developed by the CC in 1992 as a guarantee of the freedom of speech and information—was designed for a media structure fundamentally characterized by the limited number of broadcasters and one-sided information provision. In its decision No 37/1992 (VI. 10.), in order to eliminate an unconstitutional situation caused by inaction, the CC obliged the legislator to adopt legislation regarding the national public service radio and television broadcaster holding a practical monopoly at the time to enable comprehensive, balanced, and realistic information provision through the adoption of material, procedural, and organisational provisions. The constitutional arguments described in the above-mentioned ruling regarding the guarantees against the overrepresentation of any opinion were also mentioned in a subsequent decision of the CC regarding the ex-post review of media regulations pertaining to the requirement of balanced coverage. Hence, the relevant findings of the CC are worthy of a more thorough discussion.

As a starting point, the CC described the relationships between the freedom of expression, the freedom of the press, the freedom to obtain information, and the right to information. In this context, the CC referred to two previous decisions. In the first decision (30/1992. (V. 26.) AB), the CC established that the freedom of expression is the source of all communications related fundamental rights; it is also the origin of the freedom of the press. The Constitution guarantees and provides protection for free communication,—both as an act of individual persons and as a social process – regardless to the contents thereof. Due to the distinguished role of the freedom of expression, conflicting rights are to be interpreted strictly. On the other hand, and in addition to the protection of the freedom of expression as a subjective individual right, the government is also obliged to protect the institutional background of this freedom, since the government is required to set up and maintain the necessary conditions for the emergence of a democratic public. According to the other previous decision of the CC (64/1991. (XII. 17.) AB), the Government—in the course of providing objective protection to fundamental rights—is to consider the individual values associated with a fundamental right in the context of all other fundamental rights, and shall embed the protection of fundamental rights into the overall protection of the constitutional order.

In the view of the CC, the freedom of expression is enforced in a special manner regarding the freedom of the press; the distinguished role of the freedom of expression also applies to the freedom of the press where it serves the fundamental right to the freedom of expression as laid down in the Constitution. The freedom of the press is to be guaranteed by the Government with due regard to the fact that the press is a fundamental means of collecting information and expressing and shaping opinions, which are fundamental activities for the formation of individual opinions. Thus, the press is not a means of expressing opinions but also of

providing information, meaning that it plays a fundamental role in accessing information required for the formation of one's opinion (Article 61(1)).

The freedom of the press is primarily guaranteed by the Government's non-interference with press content, eg, the prohibition of censorship and the freedom to establish newspapers are in line with this guarantee. In principle, this non-interference by the Government would ensure that all opinions held by members of society and all information of public interest can be published by the press. The guarantees for the right to information—ie, the material and procedural guarantees for the freedom of information—are mostly set up by the Government elsewhere, in the context of access to information, with a general scope (not limited to the press). However, a democratic public opinion cannot ensured without the provision of comprehensive and objective information. Thus, the right to information, an indispensable means for the formation of opinions, is applied by the Constitution as a limitation to the above concept of press freedom, but only to the most necessary extent: the Parliament is specifically obliged to adopt legislation with a view to preventing the emergence of information monopolies.

The Constitutional Court also explained that the freedom of expression and the freedom to obtain information requires further conditions pertaining to radio and television, in addition to the particular conditions applicable to press freedom. In this context, exercising the fundamental right needs to be aligned with the 'scarcity' of the technical means of implementation, ie, the limited number of available frequencies. The reason for this is that, unlike in the case of printed press, the limited number of available frequencies does not allow the freedom to establish new stations without limitation. In the context of radio and television, the freedom of expression is to be guaranteed through closely regulated organisational solutions that are capable of ensuring that all opinions held by members of society are represented truthfully and in a comprehensive and balanced manner, and that information pertaining to events and facts that are of high interest to the public are presented without bias. The satisfaction of the above requirements concerning information provision and the presentation of opinions needs to be ensured for all radio and television channels ('external pluralism'). Of course, the applied organisational and legal solutions depend on the radio and television structure of any given country: what other local public service, commercial, and other channels and stations are available in addition to the national public service radio and television service, and—after considering this situation—the legislator decides on the burdens to be borne by local and commercial broadcasts, in addition to the national public service radio and television which is primarily required to perform the above obligation.

The Constitutional Court found that other particular solutions are also necessary regarding the national public service radio and television service that held a practical monopoly at the time. With regard to these service, the CC established that legislation should be adopted to lay down material, procedural, and organisational provisions to enable and require the provision of true information in a comprehensive and balanced manner, and to maintain operations in line with such requirements. As a requirement to keeping the operations in line with the Constitution, legislation was required to ensure that government bodies or certain social groups could not exert any decisive influence regarding the programme contents at the public service radio and television. According to the CC, the latter requirement was to be applied to all radio and television channels and stations in general, not only to the public service media, since the Constitution enshrined the freedom of radio and television from the Government and individual social groups. The legislation to be adopted as a guarantee for the freedom of opinion was required to ensure that the cabinet, the Parliament, government bodies, local governments, parties, or any

other social groups could not influence the content of a programme in any manner that would interfere with the truthful presentation of all opinions held by the society in a comprehensive and proportionately balanced manner and without any bias ('internal pluralism'). Thus, neither the Government nor any social group can have any right that could be used to make the catalogue of programmes one-sided or to exert decisive influence regarding the contents of programmes. This prohibition applies to indirect influence and the possibility of influence just the same.

The Constitutional Court also reaffirmed that the 'scarcity' of the resources of radio and television services at the time led to the emergence of a practice where the law guarantees the freedom of expression by setting up a special means of social representation to maintain balanced coverage and to make the corresponding organisational decisions. In this regard, the CC established that this special means of social representation used to guarantee the freedom of expression should go not be limited to or even dominated by the political representation of society. The consensus of political parties—not to mention the consensus of parties represented in the Parliament—is unsuitable for guaranteeing the unlimited freedom of expression in line with the Constitution. On the contrary, freedom from the Government means that the Parliament or the cabinet should not be allowed to play a dominant role in any organisation that is capable of influencing the contents of programmes; similarly, political parties or other groups established to carry out certain tasks or to represent certain interests should not be able to play a dominant role, either.

B. Limitation of Press Freedom in Media Regulations, with Regard to the Requirement of Balanced Coverage

While the legislator should have adopted the act on the requirements of balanced coverage by 30 November 1992 as required by the above-mentioned decision of the CC, the adoption of the first Hungarian legislative act on media took some four years. Despite the fact that the RTBA remained in effect only until 31 December 2010, the relevant provision need to be reviewed as the findings of the CC decision regarding their compliance with the Constitution are also relevant to the constitutional evaluation of the currently effective regulation, which shows material similarities with the previous regulation. The following paragraphs provide a description of the relevant provisions and constitutional review of the RTBA, as well as of the current regulation and the corresponding decision of the CC.

i. Provisions of the Radio and Television Broadcasting Act Pertaining to the Requirement of Balanced Coverage

The Radio and Television Broadcasting Act set forth as a fundamental principle at the beginning of the chapter on broadcasting that '[t]he information provided on domestic and foreign events which may be of interest for the general public, and on issues of dispute shall be diverse, factual, current, objective, and balanced' (Article 4(1)). The requirement concerning the factual way of communicating the opinions of newsreaders was further elaborated by the provision that '[a]ny opinion or evaluation relayed in connection with the news communicated shall be clearly identified as such with the name of the author specified, and shall be distinguished from the news' (Article 4(4)).

The Radio and Television Broadcasting Act also laid included requirement of the CC, as a fundamental principle, that political parties may not influence the content of the provided information. Accordingly, the RTBA required that the entirety of the programmes or any programme group may not serve the interests of any political party or movement (Article 4(2)). The Radio and Television Broadcasting Act also prohibited political parties and business associations established by such parties from acting as broadcasters (Article 86(3)a), prohibited the sponsoring of programmes by political parties, and prohibited the inclusion of the name, motto, or logo of a party in the name of the sponsor (Articles 19(1)a and 19(2)). The newscasters (regular staff of a programme provider participating in the programme provider's political and news programmes as a host, newscaster, or correspondent) were not allowed to give any opinion or relay their personal views or evaluation, other than news commentary (Article 4(3)).

In addition to the general rules laid down as fundamental principles that are applicable to all broadcasters, the act set forth additional requirements regarding public service broadcasters (Article 2(20)), public programme providers (Article 2(17)), and national broadcasters (Article 2(36)). These entities were required to provide information on domestic and foreign events which may be of interest for the general public, events significantly affecting the lives of those living in the reception area, connections, disputed matters, and the representative opinions formed of the events, including different opinions, on a regular basis, in a comprehensive, impartial, authentic, and precise manner. In connection with these responsibilities, they were required to provide for the provision of public announcements (Article 23(2)), while other broadcasters were obliged to publish public service announcements only to a limited extent, eg, during a state of distress or state of emergency (Article 137). Another qualitative requirement applicable to public service broadcasters and public programme providers required the guaranteeing of the diversity of programmes and views, of the representation of minority opinions, and of the pluralism of programmes (Article 23(3)). With regard to national broadcasters of television and radio programmes, the RTBA stipulated that these entities were to broadcast not less than twenty minutes and not less than fifteen minutes, respectively, independent and uninterrupted news broadcasts during primtime hours, while news material received from other Hungarian programme providers was not to exceed twenty per cent of the news broadcast (Article 8(3)).

In case the above requirements[116] concerning balanced coverage are violated in a material manner, the 'advocate of the opinion not expressed' or the 'injured party' (hereinafter referred to as 'objector') was allowed to lodge an objection with the program provider within 48 hours of publishing the objected communication.[117] The requirement of balanced coverage could have been committed if a broadcaster 'is found biased in providing information on social issues affecting the population of a reception area' if 'it

116 Article 49 of the RTBA regarding the procedure of the Complaints Committee did not mention any specific requirement of balanced coverage that justified the commencement of the official proceeding. It could be interpreted strictly, indicating that the proceeding could be launched upon the violation of the requirement of balanced coverage specified in Article 4(1), but it could be interpreted in a more general way—as it was done by decision No 1/2007 (I. 18.) of the CC—meaning that the proceeding of the Complaints Committee could be launched upon the violation of the qualitative requirements pertaining to the requirement of balanced coverage in general, as stipulated in Articles 4 and 23(2)–(3) of the RTBA (see Section 5 of CC decision). It should be noted that certain court rulings followed the latter, more lenient interpretation (see, eg, BH2006. 270.).

117 Within eight days, if the person does not live (stay, operate) within the borders of the Republic of Hungary.

offers the opportunity for presenting or expressing a single or a prejudiced opinion on any controversial issue', or if it grossly violates the requirement of providing objective information in any other way. The objector was allowed to request the program provider in writing to disseminate its position under circumstances similar to those of the presentation of the protested communication. According to the RTBA, the dispute regarding balanced coverage was to be settled primarily by the objector / silenced person and the broadcaster, and the Complaints Committee did not become involved unless they failed to settle the dispute. If the broadcaster did not make a decision on the objection by the prescribed deadline or if the objection was not accepted, the objector was allowed to file a complaint with the Complaints Committee, which in turn delivered a decision on the matters submitted by the objector after reviewing the objected programme.

Groundless complaints and complaints that failed to meet the requirements laid down in the RTBA were rejected by the Complaints Committee. It should be noted regarding the ground for the complaint that it was always up to the entity applying the law to decide if the weight of the violation justified the commencement of an official procedure. If the Complaints Committee established that the broadcaster did violate the requirement of balanced coverage, the broadcaster was obliged to publish the position of the Complaints Committee without any valuating explanation or to give the objector an opportunity to present his or her opinion in the manner and at the time specified by the Complaints Committee. In case of serious or repeated violation, the Complaints Committee was allowed to request the authority (ie, the ORTT) to impose a fine onto the broadcaster. Legal remedy against the position of the Complaints Committee could be sought before the Authority, and a petition for judicial review could be filed against the decision of the ORTT.[118]

The Constitutional Court received two motions for the annulment of the statutory provisions laid down in the RTBA regarding the operation of the Complaints Committee on the ground of their inconsistency with the Constitution. The Constitutional Court ruled on both motions in a single decision No 1/2007 (I. 18.). Both motions raised objections against the Complaints Committee (and the ORTT, acting as the appellate forum when resorted to) sometimes exercising 'criticism of a piece of work' in respect of individual programmes, ie, examining the enforcement of the requirement for balanced information with regard to a single programme unit only. In the petitioners' opinion, this was due to the failure of the relevant section of the RTBA on the proceeding of the Complaints Committee to explicitly exclude such examination, which section thereby violates the relevant provisions of the Constitution regarding the freedom of expression, right to information, freedom of information, and the freedom of the press.[119] For this reason, the CC considered if the limitation of the freedom of expression and the freedom of the press by the procedural rules of the Complaints Committee was consistent with the provisions of the Constitution. The following paragraphs describe the sections of the CC decision that made the greatest impact on the practical application of the law and on the subsequent legislative process.

118 The proceeding to be followed upon the violation of the requirement of balanced coverage is regulated by Articles 49–51 of the RTBA.

119 Constitution, Article 61(1) In the Republic of Hungary everyone has the right to freely express his opinion, and furthermore to access and distribute information of public interest. (2) The Republic of Hungary recognizes and respects the freedom of the press.

Based on its earlier case-law, the CC established, first of all, that the government may only restrict fundamental rights if that is the only way to protect the legitimate objectives which form the basis of the regulation; and in enacting a limitation, the legislator is bound to employ the most moderate means suitable for reaching the specified purpose. The Constitution—guaranteeing special protection for the press—recognises and respects the freedom of the press. The government must guarantee this freedom having regard to the fact that the press is, on the one hand, a pre-eminent tool for expressing opinions and, on the other hand, of disseminating and moulding opinions. For the broadcaster, the establishment of the Complaints Committee, as a body keeping watch over the enforcement of the requirement for balanced information, has been a significant restriction on the freedom of the press. Then, the CC has examined the legislative aim for which the editing freedom of the broadcasters is restricted by the procedure of the Complaints Committee monitoring the balanced provision of information.

First, the CC established that preventing the development of information monopolies is a constitutional objective.[120] The primary threat posed by the information monopolies is the emergence of 'opinion monopolies', and therefore the CC acknowledged the requirement of ensuring the pluralism of opinions as a legitimate objective. This was the objective for which the editing freedom of the broadcaster is restricted by the requirement of balanced information. In support of its position, the CC refers to the theory of influence, by stating that, as generally accepted, the opinion forming force of radio and television broadcasts and the convincing influence of motion pictures, voices and live coverages is the multiple of the thinking-inductive force of other services in the information society. Therefore, the CC found it justified in the case of the electronic media to provide for special regulations on multi-sided information, in order to allow the members of the political community to develop their views after getting familiarised with the relevant opinions about the issues of public interest.

Subsequently, the CC has examined the maintainability, after the emergence of new broadcasting technologies, of the arguments set out by the CC regarding the requirement of balanced coverage in 1992,—ie, (i) the scarcity of frequencies and (ii) the monopoly position of the public service radio and television—and how the scope of applicability of the requirement on balanced information is to be amended due to the development of information and communication technologies.

With regard to the scarcity of frequencies, the CC established that the reasoning based on the limited number of frequencies will—probably—not become completely groundless, as the expected development of new technologies requiring bigger bandwidth upon the termination of analogue broadcasting may raise the problem of the limited number of ground-base frequencies again, while other service providers (such as mobile telephone service providers) also aim to obtain good frequencies for utilisation. However, the scarcity of frequencies shall not be decisive enough to justify by itself the existence of special administrative restrictions related to the operation of radio and television (in excess of those pertaining to the printed press), with particular regard to requirement of balanced information.

120 Constitution, Article 61(4) A majority of two-thirds of the votes of the Members of Parliament present is required to pass the law on the supervision of public radio, television and the public news agency, as well as the appointment of the directors thereof, on the licensing of commercial radio and television, and on the prevention of monopolies in the media sector.

The Constitutional Court also established that the monopoly of the national public service radio and television has vanished since the previous decision was passed. In addition to terrestrial broadcasting, there are satellite-based and cable-based broadcasts, and the swift development of the communication technology offers new possibilities. Having regard to the full scale of radio and television programmes offered, external pluralism has been achieved by the creation of a multi-actor market. However, the CC held that this diverse offering of programmes does not make it unnecessary to apply the requirements of balanced information (internal pluralism).

The Constitutional Court noted that its previous decision, when defining the scope of application of the requirement of balancing related to the contents of broadcasting, was based on the presumption that the national public service radios and televisions use the frequencies in short supply, assuming that these means of mass media address the whole of the society. However, 15 years had passed since the adoption of that decision, and things had changed. At the time, not only the public service radios and televisions use ground-base frequencies, and there are broadcasters other than the public service ones taking part in forming the democratic public opinion. As the television and radio broadcasters using ground-base frequencies operate under the broadcasting licence granted by the ORTT, it is reasonable to monitor on a continuous basis whether they comply with the conditions specified in the relevant statutory regulations and in their licences. In order to maintain the pluralism of opinions, the CC designated the scope of monitoring compliance with the requirement of balanced coverage in the case of public service broadcasters established and operating by means of public funds, and in respect of commercial radio and television stations whose opinion forming power has become significant.

After concluding that the requirement of balanced coverage is constitutionally justified to maintain the pluralism of opinions, the CC reviewed the consistency of the statutory provisions pertaining to the enforcement of the requirement of balanced coverage with the Constitution. With regard to the provisions pertaining to the settlement of disputes regarding the balanced nature of coverage, the CC noted that the the possibility of filing an objection is an additional option to the existing tools of protecting rights (rectification in the press, lawsuit for the violation of personality rights, and criminal proceedings for defamation and libel). However, the possibility of filing an objection or complaint regarding a dispute concerning the violation of the requirement of balanced coverage does not aim to remedy the violation of personality rights, and its primary aim is not to correct untrue statements of facts—it offers redress for violating the requirement of balanced coverage.

With regard to the same programme unit(s), there can be parallel procedures at the court in a lawsuit for rectification in the press, and at the Complaints Committee on the basis of a protest and a subsequent complaint filed because of an alleged impairment of the requirement balanced coverage. A court judgment adopted in a lawsuit for rectification in the press is binding to the Complaints Committee; however, the procedure by the Complaints Committee does not result in a 'pending lawsuit', and the decisions passed by the Complaints Committee or even the ORTT, acting as the appellate forum, are not considered '*res iudicata*'. Therefore, when the relevant preconditions are met, the complaining party may start a procedure of rectification in the press irrespectively of starting a balanced information procedure as well. The Constitutional Court also noted that in comparison with the procedure of rectification in the press, the procedure of the Complaints Committee may be initiated by a wider scope

of persons ('the representative of the opinion not expressed' and the 'injured party'), and the requirement of factuality as an element of balancedness allows broader examination than in the case of rectification in the press. Consequently, the CC held that in order to ensure the plurality of opinions as a constitutional objective, the freedom of the press is not unnecessarily restricted by establishing an independent government agency designed to examine the multi-sidedness of information supply, and by regulating the procedure of this legal institution separately under RTBA.

The petitioner's complaint about the violation of the freedom of the press by the Complaints Committee examining the enforcement of the provision on balanced coverage within a single programme unit has been assessed by the CC jointly with the proportionality of restricting the fundamental right. The Constitutional Court emphasised that the requirement of balanced coverage may not be interpreted in a manner expecting the broadcaster to present all individual opinions in every single programme unit. Requiring the broadcaster to present all individual opinions in every single programme unit in order to enforce the requirement of balanced information would impair the freedom of the press—and in particular the freedom of editing—to an extent not justified by the legitimate legislative aim, ie, ensuring the plurality of opinions. Requiring every single programme unit to be balanced would induce the broadcasters to make less informative programmes and not to touch upon certain highly debated public issues at all, in order to avoid the commencement of a procedure by the Complaints Committee. This would result in self-censorship by the broadcasters as against multi-sided information supply, and what is more, it would make the programmes discoloured and act against the debating of public matters.

The Constitutional Court established that, under the RTBA, the broadcaster enjoys a freedom to present the relevant opinions about a topic of public interest in a series of programme units broadcast on a regular basis, and the Complaints Committee is allowed to examine the requirement of balanced coverage in more than one programme units. Upon the review of the constitutionality of a statute, the CC may adopt a decision on the constitutional requirements applicable in the course of interpreting the norm. As in the present case, the CC established that there is an interpretation of the relevant provisions of the RTBA that complies with the constitutional guarantees of the freedom of the press, so it also specified the interpretation that made the challenged statutory provision compliant with the Constitution. Accordingly, it is a constitutional requirement that, when applying the provisions of the RTBA regarding the settlement of a dispute concerning balanced coverage, the balanced provision of information should be examined within the individual programme units and for all the programme units, as appropriate, depending on the character of the programme. The guidance provided by the CC as described above imposed a general obligation on all entities applying the law, thereby promoting legal certainty.

The Constitutional Court also reviewed the provisions of the RTBA according to which the rules of procedure of the Complaints Committee shall regulate the procedure applicable to the so-called other complaints.[121] The Radio and Television Broadcasting Act does not specify the 'other' breaches in the case of which one may turn to the Complaints Committee, furthermore, it does not regulate the rules of procedure to be followed and does not offer legal remedy for

121 See Article 48(3) of the RTBA. Note that the rules of procedure of the Complaints Committee were established by the ORTT under the authorization granted by Article 48(2).

the affected persons. The Constitutional Court pointed out that the establishment and the operation of the Complaints Committee is considered a serious restriction on the freedom of the press, and, according to the Constitution (Artice 8(2)), fundamental rights may only be restricted directly and to a significant extent by an Act of Parliament. Nevertheless, under the RTBA, the procedure applicable to 'other complaints' is regulated not in an Act of Parliament but in the rules of procedure, which are not even considered a statute. According to its rules of procedure, the Complaints Committee may (and in fact did) decide not only questions related to the balanced provision of information but also complaints regarding consumer protection issues, restrictions on advertising, requests related to personality rights, and even questions of aesthetics and taste. The Constitutional Court established that, in these cases, the Complaints Committee acted without statutorily defined rules of procedure and relevant procedural guarantees, and it found no constitutional reason to maintain the procedure of 'other' complaints granting the Complaints Committee a vague competence to judge upon matters directly related to the broadcasters' freedom of editing. For the above reasons, the CC annulled the reviewed provisions of the RTBA with *ex nunc* effect, as they limited the freedom of the press unnecessarily and without any constitutionally justified purpose.

Finally, two further provisions of the CC decision should be mentioned, as they technically 'approved' of the relevant legal practice by denying the motions submitted to the CC. One of the motions suggested that the freedom of the press was limited in an unconstitutional manner by the provisions of the RTBA that obliged the broadcasters violating the requirement of balanced coverage to broadcast the statement of the Complaints Committee at the date and in the manner defined by the Complaints Committee, in accordance with the contents of the statement of the Complaints Committee, without any evaluating commentary, or to enable the protester to present his viewpoint. According to the petitioner, this provision provides too broad authorisation to the Complaints Committee, as it may specify not only the date but also the way of the broadcast. Furthermore, these opinions contain evaluating statements that interfere with the production of programmes, including editing, dramaturgy, and visual effects. The Constitutional Court established with regard to the motion that the Complaints Committee had been established by way of the RTBA in order to facilitate the provision of balanced information as a legitimate objective. To reach this objective, the Complaints Committee forms an opinion—depending on the character of the programme—upon examining a single programme unit or the totality of the relevant programmes within a given period of time. The mere fact that the Complaints Committee may specify the date and the manner of broadcasting the contents of the statement by the condemned broadcaster does not violate the freedom of the press. Should the Complaints Committee specify in a given case a manner violating the freedom of editing or an unreasonably long period of time for the communication of the required statement, the broadcaster would be able to turn to the ORTT and the court by using the legal remedies guaranteed under the RTBA. For the above reasons, the CC denied the motion filed by the petitioner.

In the other motion, the petitioner suggested the unconstitutional nature of the provisions[122] of the RTBA, according to which the condemning decision of the ORTT or—if the ORTT rejects the application of the broadcaster—the position of the Complaints Committee shall be executed with immediate effect. According to the relevant case-

122 Second sentence of Article 51(2) of the RTBA.

law of the CC, the constitutional right to legal remedy requires the legislation to allow appeal to a superior forum in order to have the decisions on the merits of first instance reviewed, furthermore, the granting of judicial remedies against the authorities' decisions. In the present case, legal remedies are offered by the procedure before the ORTT as the appellate forum and also by the possibility of judicial remedy against the administrative decision passed by the ORTT. However, legal remedies must be effective, which means that, in general, legal remedy is to be granted prior to the implementation of the decision. However, this requirement is considered to be fulfilled, since the broadcaster may appeal to the ORTT against the statement by the Complaints Committee, and this appeal has a staying effect. The legal remedy must consist of at least one appellate level for the purpose of complying with the requirements of the Constitution.[123] However, no provision of the Constitution has the consequence of granting a staying effect merely to the fact of lodging an appeal for judicial review in respect of an administrative decision already reviewed in an appellate procedure. The Constitutional Court also noted that the judge acting in the administrative lawsuit may—upon request—order the staying of the implementation of the challenged administrative decision at any time. For the above consideration, the omission to provide for a staying effect on executability in the RTBA is inconsistent with the Constitution.

ii. Provisions of the New Hungarian Media Regulation Pertaining to the Requirement of Balanced Coverage

While making some minor changes to the legislative text itself, the new media laws (PFA and MA) adopted in 2010 retained the obligation to provide balanced coverage that was introduced into Hungarian media regulations in 1996 by the above-mentioned provisions of the RTBA.

The task of the entire media system to provide true, fast, and accurate information about local, national, and European public affairs and events that are of interest to the citizens of Hungary and Hungarian nationals is laid down as a fundamental requirement by the PFA among the rights of the audience (Article 10). The requirement of balanced coverage—which can be enforced in official proceedings—was also extended to the entire media system, including radio and television broadcasts (linear media services) and on-demand media services (Article 13(2)).

The detailed rules pertaining to the requirement of balanced coverage are set forth in the MA, according to the fundamental principles of which the right to information and the right to be informed of those living within the territory of Hungary and of the members of the Hungarian nation and, in connection with this, the development and strengthening of publicity in the democratic society are fundamental constitutional interests. The Media Act also stipulated that its provisions are to be interpreted with a view to the interests of democratic public opinion (Article 5).

123 Constitution, Article 57(5): 'In the Republic of Hungary everyone may seek legal remedy, in accordance with the provisions of the law, to judicial, administrative, or other official decisions, which infringe on his rights or justified interests.'

The Media Act gives statutory power to the requirement—enshrined by Constitutional Court decision No 1/2007 (I. 18.) as discussed above—that the requirement of balanced coverage may not be enforced in relation to each and every programme unit individually. Thus, the MA stipulates that, subject to the nature of the programmes, the balanced nature of the information provision is to be ensured either within the given programme or within the series of programmes appearing regularly (Article 12(2)). The Media Act also takes over the prohibition laid down in the RTBA regarding comments by newsreader on news, by stipulating that any opinion or evaluative explanation added to the news provided in a programme is to be made in a form distinguishing it from the news themselves, indicating its nature as such and identifying its author (Article 12(4)).

In order to guarantee independence from politics, the MA took over—with one exception[124]—the relevant provisions of the RTBA, including the prohibition of providing (linear) media services by parties and their undertakings (Article 43(3)a), the various sponsorship related prohibitions (a party or political movement may not sponsor any media service or programme, and the name, slogan, or logo of a party or political movement may not be included in the designation of a sponsor; Articles 27(1)(a) and 27(4)), as well as the provision that, with the exception of explanation of the news, employees of media service providers appearing regularly in the programmes providing news service and political information as presenters, newsreaders, or correspondents may not add any opinion or evaluative explanation to the political news appearing in the programme (Article 12(3)). In addition to the above provisions that are generally applicable to all broadcasters, the MA—similarly to the RTBA—also lays down additional requirements concerning public service and community media service providers (Article 66(1)), and media services with significant market power (Article 69(1)).

However, the MA has softened the obligation of balanced coverage imposed on public service broadcasting organisations by the RTBA, since the provision of balance, accurate, grounded, objective, and responsible news services and the confrontation of dissenting opinions with one another (Article 83(1)m of the MA), conducting debates about community affairs, and contributing to the freedom of opinion based on the provision of reliable information is stated merely as a purpose for public service and community media service providers (Article 83(1) n). The qualitative provisions laid down in the RTBA regarding public service broadcasting organisations (diversity, variety, meeting the needs of minorities) are also mentioned in the MA as goals only (Articles 83(1)e and 83(1)o).

The Media Act also softened the provisions laid down in the RTBA regarding must-carry public service announcements, since public service and community media service providers and media service providers with significant market power are not obliged to publish all public service announcements,—apart from announcements pertaining to a state of emergency—only announcements of the professional disaster management agency if it provides information on the potential occurrence of danger to safety of life or property, on the mitigation of the consequences of an event that has already occurred or on the tasks to be carried out (Article 32(6)). (All media service remained obliged to publish public service announcements pertaining to a state of emergency (Article 15)).

124 The Media Act did not take over the prohibition laid down in the RTBA, according to which the entirety of the programs or any program group may not serve the interests of any political party or movement (Article 4(2)).

The Media Act retained the news service provision obligation that was previously applicable to national broadcasters, when it stipulated for linear media service providers with significant market power (a category introduced by the MA) that (i) audiovisual media service providers shall broadcast a news programme or general information programme of at least fifteen minutes in duration on each working day between 7:00 am and 8:30 am, and a separate news programme of at least twenty minutes in duration on each working day between 6 pm and 9 pm without interruption, and (ii) radio media service providers shall broadcast a separate news programme of at least fifteen minutes in duration on each working day between 6:30 am and 8:30 am without interruption. The act also stipulates that news content or reports of a criminal nature taken over from other media service providers, or the news content or reports of a criminal nature which do not qualify as information serving the democratic public opinion, may not be longer in duration on an annual average than twenty percent of the duration of the news programme (Article 38(1)).

The procedural rules to be followed upon the violation of the requirement of balanced coverage are partly similar to and partly different from the previous rules of the RTBA. A novelty introduced by the MA is that the act—unlike the RTBA—specifies the statutory provisions the violation of which may serve as ground for commencing an official procedure (Article 181(1)). Another novelty of the MA is that the group of persons entitled to initiate a proceeding has been extended significantly; any viewer or listener—other than the person the opinion of whom was presented—can file an objection with the media service provider within 72 hours of the publication of the contested information. The media service provider is required to make a decision on granting or denying the objection within 48 hours. The Media Act also introduced new rules regarding the subsequent phase of the proceeding, as the applicant may initiate a regulatory procedure right away, if media service provider denied the objection or remained silent (the Complaints Committee has been dissolved). The application is decided by the MC, if it is filed against a media service provider with significant market power or a public media service provider.

Applications other against media service providers fall within the competence of the Office. Appeals against the decision of the Office may be filed with the MC, while the decisions of the MC may be subject to judicial review without the possibility of any further appeal.[125] If the Authority establishes that the media service provider has infringed the obligation of balanced coverage, the media service provider is required to broadcast or publish the decision passed by the Authority or the notice defined in the decision, without any assessing comment thereon, in the manner and at the time specified by the Authority, or is to provide an opportunity for the applicant to present his/her viewpoint. No further legal sanctions may be applied against the offender. For example, and contrary to the previous provisions of the RTBA, no fine may be imposed upon a (repeated) offence (see Article 181).

In the months that followed the entry into force of the new media regulations, the Hungarian Government negotiated with the European Commission and, in 2013, the Council of Europe regarding the amendment of Hungarian media regulations. These negotiations resulted in the amendment of the relevant provisions of the PFA as described below.

125 The judicial review review of the final decision adopted in the course of the court proceeding of one appellate level may be sought at the Curia on the ground of unlawfulness. A constitutional complaint may be filed against the decision of the Curia if a piece of legislation applied in the court proceeding is inconsistent with the constitution.

As per the recommendation of the European Commission, the PFA, effective as of 6 April 2011, does not apply the requirement of balanced coverage to on-demand media services. The Hungarian legislator accepted the position of the Commission that the application of the requirement of balanced coverage is only justified in relation to linear media services. As a new content related requirement, the PFA also stipulates regarding the MA—which sets forth the detailed rules pertaining to the requirement of balanced coverage—that the detailed rules are to be established in compliance with the requirements of proportionality and the guaranteeing of a democratic public opinion.

In the view of the Council of Europe, the adjectives 'diverse', 'factual', 'current', and 'objective' used in the statutory text regarding the requirement of balanced coverage make the interpretation of the obligation imposed on linear media service providers rather complicated, so the Council of Europe suggested the use of the word 'balanced' only. The legislator accepted this suggestion as well and explained in the justification for the corresponding amendment to the PFA that 'since the meaning of the term "balanced"—according to judicial case-law—is a general category that includes all the above-mentioned factors, the amendment actually does not narrow the scope of the act, but only simplifies the task of legal interpretation.'[126]

According to the above-mentioned amendments, the currently effective text of the PFA stipulates that '[l]inear media services engaged in the provision of information shall provide balanced coverage on local, national and European issues that may be of interest for the general public and on any events and debated issues bearing relevance to the citizens of Hungary and the members of the Hungarian nation, in the general news and information programmes broadcast by them. The detailed rules of this obligation shall be set forth by the Act with a view to ensure proportionality and democratic public opinion.' (Article 13)

The Constitutional Court carried out the review of the new media regulations in 2011. In its decision No 165/2011 (XII. 20.), the CC did not examined the provisions relating to the requirement of balanced coverage specifically, but, as a general guarantee, it reaffirmed the consistent case-law of the CC regarding the relationship between the freedom of expression, the freedom of the press, the freedom to obtain information, and the right to information. The Constitutional Court noted that the foundation of the freedom of expression is twofold: the freedom of expression serves both individual autonomy and, for the community, the possibility of creating and maintaining a democratic public opinion, so that the Government is also obliged to maintain the institutions required for the latter. With regard to the freedom of expression, the CC considers the press to be of utmost importance for the creation and maintenance of a democratic public opinion, since the press is not merely a means of expressing opinions but also of providing information, meaning that it plays a fundamental role in accessing information required for the formation of one's opinion.'

The Constitutional Court also established that the amendment of 7 July 2010 to the Constitution did not affect the previously elaborated meaning and interpretation of the freedom of the press; on the contrary, it recorded in the Constitution that the freedom of expression has a twofold constitutional meaning. The justification for the freedom of the press remains twofold, even after the amendment of the Constitution, so that the political community is in need of the right to access and obtain fundamental public information required for opinion forming and developing a democratic public opinion, which are in fact

126 Justification for the Amendment No T/10051 on the PFA.

based on the operation of a free press. The formation of democratic public opinion is the institutional right, and, indeed, the responsibility of the press.[127]

The twofold justification for the freedom of the press is also included in the FL that replaced the Constitution, as it stipulates that 'Hungary shall recognise and protect the freedom and pluralism of the press, and ensure the conditions for freedom of information necessary for the formation of democratic public opinion' (Article IX(2)). Considering the quoted provision of the FL and the relevant case-law of the CC, it seems clear that the requirement of balanced coverage imposed by currently effective Hungarian media regulations seek to serve the formation (maintenance) of a democratic public opinion and, consequently, it may not be deemed as an unnecessary or disproportionate limitation of editorial freedom.

C. Practical Enforcement of the Requirement of Balanced Coverage

The requirement of balanced coverage is laid down in the PFA in relation to information and news programmes published by linear media services providing information services. According to the statutory text, such programmes are to provide balanced coverage on local, national, and European issues that may be of interest for the general public and on any events and debated issues bearing relevance to the citizens of Hungary and the members of the Hungarian nation. According to the MA, the balanced nature of the information provision is to be ensured—subject to the nature of the programmes—either within the given programme or within the series of programmes appearing regularly. The following section provides some of the criteria considered by the Authority in individual cases in the course of reviewing compliance with the requirement of balanced coverage with a view to enforcing the above requirement.

i. The Information Programme Genre

The requirement of balanced coverage is laid down in the PFA in relation to information and news programmes published by linear media services providing information services. The practical application of the above statutory provisions raises the question if they refer to any particular genre.

The Authority established in a 2013 decision that the answer was yes, ie,[128] the requirement of balanced coverage was applicable to information and news programmes. The Media Act provides the following definition of a news programme: 'a programme which devotes at least 90 per cent of its duration to cover the current events of Hungarian and international

127 The relevant provisions of the Constitution prior to 7 July 2010: 'Article 61(1) In the Republic of Hungary, everyone has the right to freely express his opinion, and furthermore to access and distribute information of public interest. (2) The Republic of Hungary recognizes and respects the freedom of the press.' The relevant provisions of the Constitution, effective as of 7 July 2010: 'Article 61(1) In the Republic of Hungary, everyone has the right to freely express his opinion, to free speech, and furthermore to access and distribute information of public interest. (2) The Republic of Hungary recognizes and respects the freedom and diversity of the press. (3) With a view to creating a democratic public opinion, everyone has the right to adequate information provision on public affairs.
128 Decision No 350/2013. (II. 27.) of the MC.

public affairs' (Article 203(17)). The Act does not provide a definition for an information programme. Nevertheless, the Authority finds it justified to apply a strict interpretation (political programmes, programmes covering public affairs in general, morning magazine programmes), because—a more lenient interpretation—almost any and all programmes provide information (on something). The Authority also established that the requirement of balanced coverage may be enforced even against an issue presented in magazine programme by 'crossing' the above limits of genres, since the purpose of the regulation is to ensure that the relevant opinions are presented in relation to a matter of public interest. If the review relies on the provided information only, the examination of the above-mentioned genre related features and limitations may be ignored or, at least, becomes less important.

However, the Authority abandoned this position in 2014, and established in numerous decisions that there is no statutory provision that would indicate any specific genre that covers information and news programmes, because it is not the genre of a given programme, but the act of providing information and publishing pieces of news that is relevant to the application of the law. In the view of the Authority, the most relevant factor is how a given programme approaches and presents a specific issue.[129] This is confirmed by the provisions laid down in Article 12 of the MA, which also reaffirms the requirement of balanced coverage. In this context, the Authority referred to the decision No 1/2007 (I. 18.) AB regarding the constitutionality of the statutory provisions on the requirement of balanced coverage, according to which this requirement is to be met by the act of providing information on a given matter or issue. In relation to this opinion or view,—as a starting point – the emphasis may move from to the objected programme to the possible impact of the provided information onto the audience.

In a more recent case, the Authority considered the genre of the objected programme to be of utmost importance regarding the requirement of balanced coverage, since the given programme provided portraits and stories concerning public figures and other subjects of the news.[130] The Authority emphasised that the requirement of balanced coverage is generally applicable to the presentation of a given matter or event, requiring that the different views and opinions are presented. However, a 'portrait magazine programme' aims to present the life or life period of a public figure presented in relation to an event or anniversary, and the editor is free to select the persons who are invited to speak and the opinions that are to be presented in the programme. The Authority naturally established that this (editorial) freedom cannot be limited,—not even by the requirement of balanced coverage – because the programme was not published with the purpose of providing information regarding a public or political event. The portrait programme aims to present different lives, careers, and life periods only, so its impact on the formation of opinions must be distinguished from that of programmes providing news of public and political affairs. The 'portrait magazine programme' presents the subject as seen by a relative, friend, or acquaintance according to the relevant events, so it can be biased or unbalanced without being in violation of the other regulatory norms.

According to certain opinions in legal literature, the requirement of balanced coverage cannot be construed in the context of individual programmes, despite the fact that they provide information and news. For example, journalistic writings, notes, and satiric or humorous programmes do not aim to provide information but to present of the views of

129 Decisions Nos 1251/2014. (XII. 16.) and 1189/2014 (XII. 9.) of the MC.
130 Decision No 979/2014. (X. 7.) of the MC.

the certain persons regarding various topics. The enforcement of balanced coverage against the speech of such persons would be clearly a violation of their right to free expression.[131] A documentary or interview film usually shows an actual event, topic, or phenomenon through the eyes of the director, which is not even necessarily current or relevant to the public. The individual and artistic approach of the creators to the given topic does not necessarily provide an objective and comprehensive view, while they might even aim to trigger emotional responses. In such cases, the requirement of balanced coverage is not applicable either.

ii. Guarantee of Democratic Public Opinion

According to the PFA, the requirement of balanced coverage must be met with regard to significant events and disputed matters that are of high interest to the public, in order to ensure the formation of a democratic public opinion. With a view to facilitating the consistent and foreseeable application of the law, judicial case-law has already developed the definition of an 'event of high interest to the public' during the period of the previous media act. According to the relevant case-law, an information is considered to be of high interest to the public, 'if the given topic affects the day-to-day life or affects the general well-being of the people living in the reception area, if it relates to the use or utilization of state assets, or if it relates to services relating to a constitutional obligation of the state or a fundamental right stipulated in the Constitution.'[132] The above definition is not applied in practice at this time, but the considerations of the Curia decision mentioned below are regarded as authoritative.

According to the CC, the application of the requirement of balanced coverage is acceptable 'in order to allow the members of the political community to develop their views after getting familiarised with the relevant opinions about the issues of public interest.'[133] The Curia also established in this regard that the requirement of balanced coverage does not apply to all debates or differences in opinion that are conducted in public. A legal dispute between undertakings may be of high interest to the public, but the violation of the requirement of balanced coverage may not be applied, unless it is relevant to public life as well.

The above decision of the Curia—which is still frequently referred to by the Authority in cases pertaining to the requirement of balanced coverage—brought around the conclusion of a regulatory procedure that was initiated by a pharmaceutical company against a television programme. The topic of the objected programme was the lawfulness of comparative advertising, and it presented various views on the matter with examples. One example was a comparative advertising which was produced by a competitor of the applicant and which compared a product of the applicant to a product of its competitor. The experts—the business director of the competitor, and an employee of an advertising agency—interviewed in the programme stated that the comparative advertising presented as an example was lawful. The applicant objected to the fact that its opinion was not presented in the programme, while its product was directly affected by the comparative

131 K Kertész, 'Kiegyensúlyozottság és pártátlanság az elektronikus médiában a Panaszbizottság 2004-es döntéseinek tükrében' *Médiakutató* 3. (2006) 104.

132 Budapest Metropolitan Court judgment No 24.K.33917/2004/8, reaffirmed by Budapest Court of Appeal judgment No 4.Kf.27.281/2005/4.

133 Decision No 1/2007. (I. 18.) AB, Section III.2. of the justification.

advertising shown in the programme, and that the aired statements were false, meaning that the programme failed to meet the requirement of balanced and factual coverage.

The Authority considered the merits of the case, and rejected the action,[134] because the primary purpose of the objected programme was to give a general overview of the regulation of comparative advertising and to discuss the impact of such advertisements on competitors and consumers through examples. The Authority did not agree with the applicant in that the topic of the programme was a comparative advertisement with the product of the competitor. The information provided in the programme did not lose balance by virtue of the fact that the views of the applicant were not presented, since the topic of the programme was comparative advertising as a marketing tool in general, and other advertisements and products were also mentioned during the programme. With reference to the complaint of the applicant regarding factual information provision, the Authority also noted that the violation of the individual components of the requirement of balanced coverage does not constitute an offence in itself and may not serve as ground for a regulatory procedure; they are requirements pertaining to the balanced coverage of a matter through the presentation of opposing views. Such individual components of the requirement of balanced coverage (provision of diverse, factual, current, and objective information) may be examined only if their violation also means the violation of the requirement of balanced coverage itself.

The applicant asked for the judicial review of the decision delivered by the Authority. The final judgment of the court granted the action filed by the applicant and instructed the Authority to carry out a new proceeding. According to the court, the Authority did classify the objected programme as a programme of high interest to the public, meaning that the requirement of balanced coverage was to be enforced regarding the programme. The court also agreed with the applicant in that the statement made in the programme—ie, the comparative advertisement of the competitor was lawful, and a legal precedent was not factual, because a court proceeding was in fact pending between the parties regarding the comparative advertisement, and the competitor was also subject to a competition authority proceeding because of publishing the advertisement. The court also took into consideration a previous judicial guideline according to which the requirement of balanced coverage did include the requirement of factuality (BH2007. 203.). The court also established, after viewing the programme, that the comparative advertisement in question was given excessive emphasis in comparison to the other comparative advertisements.

A petition for review was filed against the final judgment by the Authority and the broadcaster, as intervener for the defendant. The petition was granted, the judgment was repealed, and the action of the applicant was rejected by the Curia. In the reasoning, the Curia noted that the requirement of balanced coverage set forth in the Press Freedom Act requires the provision of diverse, current, factual, and objective information with a view to guaranteeing a democratic public opinion.[135] According to the Curia, the requirement of balanced coverage is to be considered in the context of democratic public opinion; the factual nature of statements pertaining to the products of two undertakings are not related to the provision of balanced information to a democratic public

134 Decision No 350/2013. (II. 27.) of the MC.

135 The objected programme was aired after the 5 April 2013 amendment of the balanced coverage related provisions of the PFA. Thus, the text version applied during the proceeding included the requirement that the balanced coverage must be diverse, current, objective, and factual.

opinion. Such disputes that may be of high interest to the public, but are not related to public life could be reviewed, among others, in the course of other proceedings relating to press corrections or surreptitious advertisement, depending on the circumstances of the case. The Curia also did not accept the finding of the lower court in that the programme lost balance because of the false statements made in the programme. Compliance with the requirement of balanced coverage is not to be considered on the basis of the truthfulness or falsity of individual out-of-context statements but on the basis of the one-sidedness of the entire programme,—if it remains uncorrected in the programme flow – as a result of which the right to information of the public is violated.

iii. Topic

Another question closely related to the previous issue is whether the requirement of balanced coverage of important events and disputes of high interest to the public implies the obligation to report on specific events or public (political) affairs? The currently effective MA—in line with the provisions of the previous media act—sets forth, with regard to editorial freedom, that the contents of a media service (and press product) may be determined freely, but the media service provider (and the publisher of press product) is liable for compliance with the provisions of this Act (Article 3).

The editorial freedom is guaranteed among the fundamental principles of the Act, on the basis of which the Authority has developed a consistent case-law, stating that media service providers are free to determine the scope of news published in a programme, but they are liable for acting in full compliance with the provisions of the Act. It is up to each media service provider to decide which events are of high interest to the public, ie, which events are covered in individual programmes.[136] This means that there is no obligation to cover specific events, and the requirement of balanced coverage may be applied to actually covered contents only.[137]

The various court judgments issued on this matter tend to be consistent with the Authority's interpretation of the law, according to which editorial freedom includes the capacity of media service providers to determine the criteria used to select the news to be reported and the period of such reports.[138] According to the consistent judicial case-law, 'the media service provider—the editor—may select the events to be covered in its programmes and the guests to be invited to such programmes.'[139]

Alas, certain Authority and court decisions adopted during the effective period of the previous media act did limit editorial freedom significantly. The violation of the requirement of balanced coverage was established even where a service provider failed to cover certain specific events,[140] but these decisions should be regarded as rare exceptions from the general rule described above.

136 See, eg, the justification for decision No 2209/2012 (XII. 12. of the MC.

137 See, eg, the justification for decision No 757/2014 (VII. 30.) of the MC.

138 Curia judgment No Kfv.III.37.216/2013/4.

139 Curia judgment No Kfv.III.37.472/2013/11, EBH2014. K.10.

140 See, eg, Supreme Court judgment No Kf.II.28.150/1998/4 (KGD2004.24), according to which the requirement of balanced coverage 'does not only require that different positions and opinions on the same subject are presented, but also requires the plaintiff [media service provider] to provide information on matters that are of high interest to the public, because the failure to provide such information violates the principle of balanced coverage that represents a fundamental interest of society.'

iv. Care Expected from Editors and Presenters

The requirement of balanced coverage requires media service providers to provide balanced information on any matter they decide to cover as a matter of high interest to the public. Editorial freedom allows media service providers to decide which events to cover, but they remain responsible for the manner the information is provided in. The first two sections describe court judgments that were adopted during the effective period of the previous media act and are still regarded and followed as authoritative rulings by the courts.[141] The court judgment described in the third section has lost its relevance, but it provides excellent examples for the differences between the previous and current regulations.

According to an important court judgment (KGD2002. 294), *the broadcaster may not be punished if the complainant was given but did not exercise the option to present his opinion in the course of producing a report.* The decision was adopted based on a piece of investigative journalism that was produced by a broadcaster upon request by the residents of a settlement. The on-site crew shooting interviews concerning the foul smells in the village asked the local brick factory for comment, but the director strictly refused any comment and did not allow the crew to enter the premises of the factory. The objection of the complainant, ie, the factory, was granted by both the Complaints Committee and the Authority, holding that the report failed to meet the requirement of providing diverse, factual, and objective information. The Authority argued in its reasoning that the broadcaster grossly violated the principle of balanced coverage by ignoring the position of a relevant stakeholder, by using a biased introductory script, and by using using manipulative visuals. The Authority found it to be a gross violation that the brick factory was presented on numerous occasions as a source of local problems during the report, but it was not given a real possibility to present its position that it had nothing to do with air pollution and the smells.

The television channel filed applied for the judicial review of the regulatory decision. The court of first instance amended the regulatory decision and rejected the complaint, and this judgment was also upheld by the Supreme Court acting as the court of second instance. The court of first instance conducted an evidence procedure to determine if the brick factory was in fact given the possibility to present its opinion, ie, if the possibility offered by the broadcaster was in fact real. Based on the available documentary and witness testimony, the court established that the factory was offered the opportunity to presents its opinion, but chose not to do so. According to the court of first instance, a television report covering a current conflict does not violate the principle of balanced coverage by the mere fact that there might be opinions that are different from the issues raised during the report. It would be unreasonable to expect that a programme that raises an issue for the first time should not be broadcast unless all possible stakeholders were identified and provided an opinion. The court of first instance held that a certain atmosphere of criticism seemed to be unavoidable in the course of presenting the opinions of residents, at least if the editor wished to present those news without any distortion. If a programme seeking to protect popular interests is not allowed to use the means of criticism, it becomes irrelevant. Thus, one should not seek to eliminate the right to criticise but to ensure that the offered criticism is in fact true at all times.

141 Following quasi-precedents is a frequently used means of the process of legal interpretation. Other sources of legal interpretation include uniformity decisions, court decisions, council positions, decisions of the CC, and the 'established case-law.'

The conclusion of another judgment that is regarded as authoritative even today may be summarized by the following sentence: 'With regard to news programmes, the broadcaster is to meet the statutory requirement of balanced coverage only in the context of data that are known at the time of editing.'[142] The procedure that resulted in this decision was initiated by a polling company against a television channel, because, according to the complaint, it did not mention any result—including the results measured by the complainant—that was different from the opinion poll results mentioned in the previous day's news report, thereby violating the statutory requirement of balanced coverage.

The Complaints Committee and the Authority granted the complaint, but the television station moved for judicial review and the court of first instance amended the decision of the Authority by denying the complaint. The court argued that the plaintiff admittedly publish the polls that were available on 28 February 2000, as it was not aware of any other data that became known to it on the following day only. Thus, the plaintiff exercised due care at the time of editing its news programme on 28 February 2000, and the condemning decision of the Authority was found to be groundless. In the court's view, the broadcaster cannot be expected to publish poll results that became known to it only later on unless the publication of such data in another news report on the same issue is justified by the timely nature of the data.

The Supreme Court established, delivering a final ruling on the appeal filed against the judgment of the court of first instance, that the court of first instance established the facts of the case correctly and drew correct legal conclusions, so the judgment was reaffirmed by the Supreme Court as a materially correct judgment. The Supreme Court noted with regard to daily news programmes, that the broadcaster is to meet the requirement of balanced coverage only in the context of data that are known at the time of editing.

According to another court judgment adopted under the new media regulations,[143] also with regard to the provisions of the above abstract ruling, the Authority should have considered during the proceeding, among others, when the missing position was published by the applicant who filed an objection against the news programme of the media service provider, and if the media service provider had a real opportunity to become familiar with and include in its news programme the omitted opinion, taking into account the technical and editing circumstances and other factors. The establishment of these circumstances is indispensable prior to any material consideration, as the inclusion of the omitted content may have been prevented by timing related or technical reasons.

A court decision adopted under the previous media regulation was considered authoritative regarding public service broadcasters, according to which *a public service broadcaster is required to at least indicate the existence of dissenting opinions by making a reference to them when presenting a one-sided opinion in a given programme* (BH2006. 270.). The proceeding was focused on an interview programme of a public service radio station, which presented four interviews (an interview on education policy, an interview with a Romanian politician who is a Hungarian national, an interview regarding a political movement turning into a political party, and an interview on the privatisation of medical institution) which—in the view of the Authority—were inconsistent with the requirement of balanced coverage (among others).

142 BH2005. 80., KGD2005.59 (Supreme Court judgment No Kf. III. 37.187/2002).

143 Budapest Administrative and Labour Court judgment No 3.K.30691/2013/6 of the on the judicial review of decision No 159/2013. (I. 30.) of the MC, which was reaffirmed by Curia judgment No Kfv.III.37.379/2013/4.

The Authority condemned the broadcaster because the presenters—while they noted several times during the programme that the some guests who were invited to the programme to present their opinions refused to appear—did not make any attempt to generate substantial dispute by presenting the position of an absent party regarding certain disputed matters, thereby enabling the members of the audience to formulate a comprehensive opinion on the discussed matter that includes all relevant arguments.

The broadcaster moved for the judicial review of the condemning decision of the Authority, asking for the amendment of the regulatory decision due to the absence of any violation. The court of first instance amended the regulatory decision in part, establishing that the requirement of balanced coverage was violated by the broadcaster only in relation to one interview (the one made with the Hungarian national politician in Romania).

After listening to the sound recordings submitted as evidence, the court of second instance—(partially) in agreement with the appeal filed by the Authority against the judgment of the court of first instance—concluded that all programme sections specified by the regulatory decision were inconsistent with the requirement of providing comprehensive and unbiased information. As for the interview with the Hungarian national politician in Romania, the Members of Parliament accused by the interviewee were not interviewed, and the presenter did not make any effort to provide a comprehensive view and information regarding the issues raised. As for the interview with the leader of the political movement turning into a party, the interviewee unilaterally emphasised the issues he considered to be problems in the context of the accession to the EU. Opinions that were different from that of the organisation were not presented, and the reporter did not indicate that additional material circumstances should be taken into account in this context. The interview regarding the privatisation of hospitals offered a criticism of the measures taken with regard to the Act on Hospitals, but no other position and no other possible aspects of the situation were presented during the programme. The programme producers did not make any effort to mention the possible advantages of the new piece of legislation or to reveal the expected benefits. The court of second instance established that the requirement of balanced coverage was not fully met by the interview on education policy either. In the view of the court, the broadcasters were obliged to refer to counter-arguments to the ones presented, as well as to significant and relevant facts and circumstances, because the provision of authentic information regarding the covered education policy issues would have served the interest of the listeners.

The broadcaster moved for the review of the judgment of the court of second instance. According to its arguments, the findings of the judgment of the court of second instance moved judicial case-law in a direction that would require all programmes, even programme segments, to meet the requirement of balanced coverage. It also argued that the requirement of balanced coverage was to be met with regard to individual issues; however, it considered to be possible to cover any issue and present the stakeholders holding various opinions in more than one programme. According to the broadcaster, meeting the requirement of balanced coverage cannot be expected within each and every programme, and there are even programmes that cannot be subject to that requirement.

However, the Supreme Court shared the position of the court of second instance in most regards. According to the court, it is frequent, life-like, and acceptable that one issue may be presented from only one point of view—possibly with interviewees expressing extreme opinions—within a single programme, and that was not necessarily due to the fault of the

producers of the programme. However, the court found it unacceptable that, in such cases, the programme producers of a public service broadcasting organisation would fail to inform the audience about the existence of dissenting views and opinions. It argued that returning to the given topic and giving voice to the 'other side', or presenting the dissenting opinions, later on was indispensable. Thus, the public service broadcaster meets the statutory requirement of balanced coverage (Article 23(2) of the RTBA), if it at least mentions the existence of dissenting opinions in a programme featuring one-sided and extreme opinions only, and if it indicates the relevant information and data of broadcasting such dissenting opinions (date, programme, etc.). Since the reviewed programme did not offer at least such information or references,—not to mention the presentation of the dissenting opinions themselves—all four reports committed the violation as established by the final judgment.

Note that the above-mentioned requirement cannot be applied to public service broadcasters under the currently effective media act. The current regulation does not make such distinctions between service providers, so the court judgment on the objection filed against the news programme of a commercial media service provider for its failure to meet the requirement of balanced coverage is authoritative with regard to public service broadcasters as well. The courts that were involved in the case pointed out that the requirement of balanced coverage can be met by a series of regular programmes if it cannot be met by a single programme for some reason, provided that doing so does not violate the right of the audience to adequate information provision. The possibility to meet the requirement of balanced coverage with a series of programmes may be regarded as a relief for media service providers, who are free to decide if they wish to meet the requirement of balanced coverage within a given programme or with a series of programmes. In the case at hand, the applicant was an opposing political party that was always eager to offer intense criticism of the actions of the cabinet, so the courts needed to proceed with utmost care to make sure that the views of the applicant were not expressed elsewhere in a similar programme. The news programmes of the media service provider provide information on the activities of political actors—such as the applicant—regularly. Media service providers cannot be expected to present the views and opinions of each and every political actor in each and every news programme.[144]

v. Relevance of the Omitted Information

The various positions on the relevance of the information omitted from the objected programme are presented in this subchapter through practical examples. The judicial case-law (judgments of the Budapest Administrative and Labour Court) regarding actions filed for the review of regulatory decisions on such matters seems to be inconsistent, several final judgments were annulled through the means of extraordinary remedy, and it also happened that rather similar cases were decided in different ways by different councils of the Curia.

The first authoritative judgment is used to describe the joint conditions regarding the relevance of the omitted information that are to be met in order to establish the violation of requirement of balanced coverage. In this case, a Parliamentary party in opposition

144 Budapest Administrative and Labour Court judgment No 3.K.30691/2013/6 on the judicial review of decision No 159/2013. (I. 30.) of the MC, which was reaffirmed by Curia judgment No Kfv.III.37.379/2013/4.

objected to a news programme of a television broadcaster because the official position of the applicant—which was published in the course of a press conference—was not covered in the news segment covering the intention of the cabinet to cut the overhead costs of households. In the course of the regulatory proceeding, the media service provider moved for the rejection of the objection raised by the applicant political party. It noted, eg, that the applicant had shown a long history of filing objections against almost every actor of the media on the ground of violating the requirement of balanced coverage. It is a typical feature of parliamentary democracy that the political parties represented in the Parliament are informed about and have an opinion about every issue raised before the Parliament, and they also hold press conferences regularly. The media service provider referred to a previous decision of the Authority,[145] according to which the constitutional right to press freedom would be violated if a political party were free to decide which sentences, in what order, and with what kind of footages could be included in a news report. The decision of the media service provider to cover the events organised by certain political parties and not to cover the events (or the lack thereof) of other parties can be made freely and lawfully as part of the editorial freedom of the media service provider. Furthermore, there are dozens of press conferences every day some of which even remain unknown to media service providers, while their capability to attend each and every event may also be limited by their available capacity in terms of equipment and personnel. The media service provider also referred to another decision of the Authority,[146] stating that media service providers are free to determine, as part of their editorial freedom, which pieces of news are to be covered in their news programmes, meaning that they are free to decide which events are of high interest to the public, which events should be covered, and which persons should be heard during a programme. No person has a subjective right to appear or to have his opinion presented in any medium.

Furthermore, in the opinion of the media service provider, relevant views need to be presented in the course of covering an event of high interest to the public. In this respect, it referred to the decision No 1/2007 (I. 18.), where the CC established that the requirement of balanced coverage may not be interpreted in a manner expecting the broadcaster to present all individual opinions in every single programme unit. According to the cited CC decision, it is sufficient to present a single dissenting opinion or at least to indicate that there is/are opposing opinion(s). In the view of the media service provider, all these requirements were met in the given case, as it covered both the intention to reduce the overhead costs of households and the responses of opposition parties. The announcement of the applicant did not present an opinion that was opposing the one presented, and there was no significant difference between the published opinion and the position of the applicant. The media service provider also argued that it covered the agendas and events of political parties—including the applicant—and the statements made by the leaders of such parties—including their views on specific matters—in several news programmes.

The Authority did not agree with the media service provider in that the announcement of the applicant did not present any opposing position regarding the presented opinions, so it granted the objection and required the media service provider either to publish a notice of infringement of the requirement of balanced coverage or to present the omitted position of

145 Decision No 810/2010. (XII.15.) of the MC.
146 Decision No 1653/2011. (XI.16.) of the MC.

the applicant.[147] The media service provider filed an action against the regulatory decision. The court repealed the challenged decision and instructed the Authority to carry out a new proceeding.[148] The court condemned the Authority for committing two procedural errors. On the one hand, the Authority did not take into account whether or not the opinion of the applicant had been presented on any other occasion, since the news programmes of the media service provider provided information on the activities of political actors—such as the applicant—regularly.[149] On the other hand, the Authority did not take into account the date of publishing the omitted position of the applicant, ie, if the media service provider had a reasonable opportunity to learn about the position of the applicant, and edit it into its programme, taking into account the necessary technical and editing related needs and requirements.

The court granted the action based on the following considerations. It established that, with regard to the requirement of balanced coverage, *the following joint conditions are to be met: the relevant position or opinion must be directly related to and materially different from the ones presented; and it must not have been presented in the given programme or a regularly published series of programmes.* Upon viewing the objected programme, the court established that the position of the applicant did not show any relevant difference from the other positions covered (ie, that the rate of the reduction is less than 10 per cent), and that the additional statements made during the press conference of the applicant (concerning the review of the privatisation of the energy sector, energy prices, and the extra profits realized by energy companies) were only indirectly related to the pieces of news provided by the media service provider. The court established that media service providers were not obliged to cover all aspects of and events leading to any given piece of news, and that news programmes are unfit for offering a complex analysis of an issue by their nature. Media services providers were not required to make sure that the opinions of all other political parties are presented whenever a political figure is given airtime in a programme. In the context of the requirement of balanced coverage, political parties do not have a subjective right to present their views. Parts of the applicant's position did not show any relevant difference from the central topic of the presented opinions, while other parts of the applicant's position were not directly related to the presented information, so the violation of the requirement of balanced coverage could not be established as the relevant conditions were not met.

In compliance with the authoritative final judgment, the Authority conducted a new procedure,[150] where the following criteria were taken into account regarding the omitted opinion: Was the omitted opinion made available to the media service provider in due time?;

147 Decision No 159/2013. (I. 30.) of the MC.

148 Budapest Administrative and Labour Court judgment No 3.K.30.691/2013/6, which was reaffirmed by Curia judgment No Kfv.III.37.379/2013/4 as a result of the Authority's application for extraordinary legal remedy.

149 Note that another council of the Curia presiding over a similar case reached a different conclusion by establishing that it should not be taken into account whether or not the omitted opinion of the applicant was published by the media service provider in other programmes or in relation to other pieces of news, and that the publication of the omitted opinion of the applicant should be taken into account in relation to the reviewed news programme only. (Curia judgment No II.37.601/2013/5 regarding the case concluded by Media decision No 471/2013 (III.20.) of the MC, where the same opposition party objected to a news programme of the media service provider, because the opinion of the applicant was not presented in a news segment covering the reduction of water and household waste charges.)

150 Decision No 1640/2013 (XI. 19.) of the MC was adopted in the course of the repeated proceeding.

Was the omitted opinion relevant to the published information?; Was the omitted opinion materially different from the presented opinions? Based on these considerations, the Authority considered the date of publishing the press release of the applicant at first, and established that it was published almost 2.5 hours before the commencement of the news programme of the media service provider, meaning that the media service provider did have sufficient time to process the press release. (The Authority did not consider whether or not the omitted opinion of the applicant was covered in another news programme of the media service provider.)

At the next stage, the Authority considered the issue of relevance of the omitted opinion. In this respect, it established that the requirement of balanced coverage may not be interpreted in a manner expecting broadcasters to present all individual opinions in every single programme unit, as presenting all opposing views and opinions is not always feasible. The purpose of the regulation is to ensure that members of the audience can develop their own positions on public matters after hearing the relevant opinions. As for information provided on matters of high interest to the public, the requirement of balanced coverage may be violated only in relation to opinions—especially the material content of opinions—that are closely and directly related to the subject matter at hand. This is because a proponent of an opinion may express other additional positions that are not related to the subject matter, meaning that they are not relevant for the purpose of considering a possible violation of the requirement of balanced coverage.

With regard to the above considerations, the subject and topic of the challenged coverage is to be identified as the first step, because doing so is indispensable to the making of any decision as to whether or not the position—or any part thereof—proposed by the applicant is relevant to the subject of the programme. In other words, if an opinion is not directly related to the information presented in a programme, the requirement of balanced coverage becomes irrelevant, meaning that the failure to present such an opinion may not result in the establishment of the violation of the requirement of balanced coverage. After reviewing the contents of the news programme and the press release, the Authority established that parts of the position of the applicant—ie, that the promised overhead cut of 10 per cent is in fact only a 3 to 4 per cent cut—are relevant, since it was closely and directly related to the central topic of the news report (ie, whether or not the 10 per cent cut would be eventually achieved). The Authority also established that media service providers are not required to present all published opinions regarding a given piece of news, as only the relevant opposing views that are directly related to the given piece of news are to be presented, or at least referred to, in order to meet the requirement of balanced coverage. The Authority established that the news programme of the media service provider did not lose balance on the ground of omitting the opinion of the applicant. The opinion of the applicant—ie, that the 10 per cent cut in energy prices as promised originally would not be more than 3 to 4 per cent—was similar to and was not materially different from the position presented in the programme, according to which the cut in household overhead costs would be less than 10 per cent. The fact that the applicant specified an estimated figure of 3 to 4 per cent in addition to questioning the achievement of the 10 per cent cut did not make its opinion markedly different.

The announcement of the applicant did not contain any other part that was directly related to the contents of the programme, meaning that they were not relevant to the issue of compliance with the statutory requirement of balanced coverage. *Apart from the position regarding the 3 to 4 per cent cut in energy prices,* the other parts of the statement (the party

would reduce energy prices by reviewing the guaranteed profit of service providers, as a result of which overhead costs could be reduced by 30 to 40 per cent, and the party also urged the simplification of invoice templates and a more lenient approach toward collection) of the applicant were not directly related to the main topic of the news programme (*Lesz-e 10% a 10%?—Will it really be 10 per cent*?) as they provided an overview of the ideas of the applicant, meaning that the presentation of those pieces of information was not required within the same news programme. With regard to the above considerations, the Authority established that the reviewed news programme broadcast by the media service provider did not violate the requirement of balanced coverage. The omission of the position of the applicant, according to the objection, did not result in the violation of the requirement of balanced coverage. Thus, the Authority denied the application filed by the applicant.

In the course of proceedings relating to the possible violation of the requirement of balanced coverage, media service providers frequently claim that the Authority applies the relevant statutory provision in a manner that violates their editorial freedom. One media service provider even cried censorship when it was condemned by the Authority for failing to present an opinion in its news programme. However, this position of the media service provider was regarded by the Curia as erroneous, because censorship would mean that the media service provider were allowed to present only a specific opinion in relation to a piece of news, while it were required to silence any and all markedly different opinions.[151] The case-law of both the Authority and of the courts seems to be well-established and consistent in that the right to editorial freedom is interpreted only within the context of enforcing the statutory requirement of balanced coverage. The obligation of balanced coverage does not constitute any disproportionate limitation of editorial freedom, as it facilitates the provision of adequate information that is necessary for the development of a democratic public opinion.

VIII. Limitation of the Freedom of the Press in Commercial Communication in Media Law Practice

A. Constitutional Arguments for the Limitation of Commercial Communication

According to relevant case law of the Hungarian Constitutional Court regarding business advertisements, the constitutional fundamental rights concerning press freedom and the freedom of speech[152] provide protection for public communication regarding various ideas, facts, and opinions, but also protect the freedom of communication—the freedom to express one's opinion—itself. Thus, according to the CC, commercial and business communication falls within the scope of speech afforded constitutional protection.[153] However, the difference

151 Curia judgment No Kfv.III.763/2014/8 on the review of decision No 215/2014. (III. 6.) of the MC.

152 Article 61 of the Constitution, Article IX of the Fundamental Law.

153 The Constitutional Court has been affording protection to advertisements under the egis of the freedom of opinion and speech since the adoption of 1270/B/1997 AB. While the protection of advertisements could have been deducted from the fundamental right to conduct a business as well, the CC decided to follow another path. However, some decisions also include considerations relating to this fundamental right (eg, 668/B/1996 AB, 23/2010 (III. 4.) AB, 20/2013 (VII. 19.) AB, and 3208/2013. (XI. 18.) AB).

between speech serving individual fulfilment and relating to public affairs, on the one hand, and commercial speech serving other purposes and relating to other matters, on the other hand, has a significant impact on the level of constitutional protection. As commercial speech is primarily or even exclusively motivated by commercial interests, the level of protection afforded to such speech is significantly lower; in other words, 'more extensive interference by the state might be constitutionally justified than in the context of other kinds of speech' (1270/B/1997 AB).

The Constitutional Court affords additional protection to the freedom of expression as it is indispensable to the self-expression and the free development of the personality of the individual, with a view to promoting the participation of the individual in democratic society. Commercial advertisements are not directly related to these fundamental values of freedom of speech, as advertisements are more focused on the sales, marketing, and promotion of goods and services than on facilitating the self-expression and involvement in the democratic discourse of individuals. Consequently, the CC held that commercial speech may be subject to more extensive limitations in a constitutional manner. According to the necessity and proportionality standard, commercial speech—due to the priority of its economic purposes and interests—may be limited on the ground of protecting the rights of others (protecting the personal and consumer rights of groups and consumers targeted by the speech and of other economic actors), providing institutional protection to fundamental rights (fair market competition, prevention of the emergence of opinion monopolies in electronic media), or public interest considerations (protecting minors, public health, public safety).

However, commercial speech may intertwine with artistic expression or contribution to public discourse, and speech by business entities may also express responsible opinions and value judgements regarding public affairs. Where distinction is to be made between the two categories, the CC held that constitutional protection for the speech at hand should be presumed, while it may be shown that there is no value to be protected in the subject matter at hand, apart from the respective business interest. The adjudgement of the constitutional protection of communication requires that the person making the communication and the subject and purpose of the communication, on the one hand, and the reason for and extent of the legal restriction, on the other hand, be taken into account (23/2010 (III. 4.) AB). The case law of the CC regarding commercial speech—as summarized above—is primarily based on the examination of the provisions of various acts on business advertisements (1270/B/1997 AB, 37/2000 (X. 31.) AB, 23/2010 (III. 4.) AB), but the derived conclusions are also applicable to commercial speech published in linear media services. Some decisions of the CC specifically involved the regulation of advertisements in audiovisual media; the two decisions are presented in more detail below.

In its decision No 483/B/2006 concerning radio and television broadcasting, the CC considered the merits of a constitutional complaint seeking the annulment of the advertisement time cap introduced by Article 16(2)of the RTBA—ie, the previous media act—based on the freedom of speech guaranteed under Article 61(1) of the Act XX of 1949 on Constitution. While the new and effective media act introduced changes to the method of calculating advertisement time, the observations made by the CC regarding the relationship between advertisements and the freedom of opinion remain valid and still worth of consideration. According to the motion for ex-post review of constitutionality, the relevant provision of the RTBA limits the constitutional freedom of speech without justification, since the wording 'a given clock hour . . . calculated in any way or form' introduces an unnecessarily strict calculation method. The period of live and sport broadcasts cannot be calculated accurately

in advance, and any delay may have an impact on the starting times of advertising blocks, meaning that time devoted to advertising calculated for any hour may exceed the allowed twelve minutes, even if the broadcaster proceeds with extreme caution.

The Constitutional Court held that the motion was groundless. As the starting point of its reasoning, the CC held that the European Convention on Transfrontier Television, adopted in Strasbourg on 5 May 1989 and Council Directive 89/552/EEC of 3 October 1989 on the coordination of certain provisions laid down by Law, Regulation or Administrative Action in Member States concerning the pursuit of television broadcasting activities form part of Hungarian law and lay down as a minimum requirement regarding television advertisements that the total time of advertising and teleshopping may not exceed 20 per cent within one hour of transmission time (Article 12(2) of the Convention), and the ratio of advertisements and distance selling programmes may not exceed 20 per cent within sixty minutes (Article 18(2) of the Directive). The Constitutional Court also noted that the signatories to the Convention and the EU Member States may introduce additional and even stricter rules within the boundaries of their respective constitutions, which possibility is specifically mentioned in Article 19 of the Directive.

Subsequently, the CC reasoned that the constitutional protection of the freedom of speech does cover advertisements, but the advertising activity itself—a market activity for the purpose of competition law—may be subject to government regulation. The justification for such legislation, on the one hand, is that the government must ensure a level playing field for fair market competition. On the other hand, the government must adopt laws that protect the interests of consumers, thereby protecting the right of consumers to adequate information and to safe goods and services.

Furthermore, the CC held that the advertisement regulation subject to ex-post evaluation does not limit the freedom of speech of the creator, customer, or user of an advertisement but specifies the time period available for broadcasters to broadcast advertisements. The constitutionality of the challenged provision may be evaluated on the basis of Article 61(2) of the Constitution granting distinguished protection for the press. This provision of the Constitution prohibits censorship and guarantees the freedom of establishing and editing press products. In the course of evaluating the proportionality of any restriction concerning the freedom of the press, the CC took into account the extent to which economic considerations relating to the operations of the broadcaster were followed. According to the CC, the reviewed regulation does require the broadcaster to compile its programme schedule with distinguished care and to make sure that it does not broadcast an advertisement block in the excess of twelve minutes, calculated in any way or form, even when broadcasting live programmes. However, compliance with this requirement does not prevent the broadcaster from enforcing economic considerations, meaning that it does not constitute any disproportionate limitation of the freedom of the press.

Media related rules of advertisements were also considered in the decision No 165/2011 (XII. 20.). Here, the CC considered whether printed and online press products should be afforded different treatment for the purpose of general limitations on advertising, that are mandatory for all media, as stipulated in Article 20 of the PFA, considering that the effect of such press products on the recipient is different than that of other media service providers. While the CC, in this decision, did not consider the relevant limitations on advertising with a main focus on audiovisual media services, the findings are nevertheless applicable thereto as well.

The general limitations set forth in Article 20 of the PFA include provisions pertaining to contents published specifically for commercial and economic purposes. Such provisions serve various public interest purposes, afford protection to the target group—the consumers—of commercial communications against the abusive promotion of goods and services, and seek to reveal the various interests behind sponsored contents to the target group. Article 20(7) of the PFA prohibits the promotion of products (tobacco products, prescription medication), devices (firearms, ammunition, and explosives), and services (therapeutic procedures) that are closely related to any of the legitimate grounds for limitation described above: public health considerations, maintenance of public order and public safety, or the constitutional duty of the government to protect minors.

Since the limitations set forth in the Press Freedom Act mostly concern the rights of the advertisers' commercial speech and only indirectly restrict the freedom of the press, ie, the media publishing the advertisements, the CC ruled that the differentiation between the various media is irrelevant in this context. According to the consistent case law of the CC, the regulation limits the freedom of speech and press of both printed and online press products for and on purposes and grounds that are deemed as constitutional.

B. Limitation of the Freedom of the Press in Effective Media Regulations with Regard to Commercial Communication

The new Hungarian media regulations follow the AVMSD regarding the regulation of commercial communications. The need for reforming the rules of advertising with a view to creating a more competitive media industry in Europe was an important motive in adopting the AVMSD. In order to increase the revenue of media outlets, the Directive introduced new forms of advertisement, such as split screen advertisement, virtual or interactive advertisement; it also allowed product placement, made sponsorship more advertisement friendly; and softened the rules of television advertising. The Directive also introduced the term 'commercial communication' and established a uniform regulation for commercial contents provided in linear and on-demand media services. In addition to establishing a competitive media industry in Europe, the new, more flexible and liberalized advertisement regime introduced by the Directive also seeks to provide enhanced protection for consumers. The provisions of the Directive on consumer protection cover editorial responsibility, the requirement of service provider identification, consumer information provision, and various special rules relating to certain protected consumer groups.

The new Hungarian regulation was built on the minimum requirements pertaining to commercial communication within the EU. Article 20 of the PFA lays down general provisions for all media contents (including press products) regarding the publication of commercial communications, while most of the special rules pertaining to commercial communications published in media services are laid down in the MA.[154]

According to Hungarian media regulations, commercial communication means media content aimed at promoting, directly or indirectly, the goods, services, or image of a person carrying

154 Articles 23–31 and 33–36 of the MA, and see the provisions laid down in Article 20 of the PFA for media services only.

out business activities. Such contents accompany or appear in media contents against payment or similar consideration or for the purpose of self-promotion. The Press Freedom Act provides an indicative list for the possible forms of commercial communication such as advertisements, sponsorship, teleshopping, and product placement.[155] The act enabled the use of other new advertisement techniques (eg, split screen advertisement, virtual advertisement) as well.[156]

The new EU and Hungarian media regulation relaxed the rigidity and limitations of commercial communication, while paying due attention to the protection of the audience, and members of the audience are now referred to as consumers both in the context of advertisements and as actors on the media services market. The new regulation focuses on the ideal of the active and conscious media consumer who has twofold interests regarding commercial contents; on the one hand, the consumer needs to be sufficiently informed to make economic decisions, meaning that he has a right to commercial information, on the other hand, he requires protection against false, misleading, and unfair advertisements.[157] Having regard to the latter interest of distinguished importance, among others, the Hungarian legislator chose to take over the provisions laid down in the AVMSD regarding the content and form related limitations of commercial communication. The next section presents the content related limitations.

C. Content Related Limitations

According to the above-mentioned position of the CC, the freedom of opinion may be limited on the basis of public interest, consumer rights, and the protection of other economic actors and fair market competition. The Press Freedom Act lays down the general content-related limitations regarding media contents accordingly, focusing on the protection of public order, constitutional rights, and the interests of consumers and minors primarily. As a general rule for all media contents, respect must be given to human dignity (Article 14(1)), persons in humiliating and defenceless situations may not be shown in a self-gratifying and harmful manner (Article 14(2)), the constitutional order must be respected (Article 16), the content may not be capable of inciting hatred or exclusion (Article 17(1)–(2)), minors may not be shown in any way that may seriously jeopardize their age-appropriate psychological or physical development (Article 19(4a)). Furthermore, linear media services may not include media content that could materially damage the intellectual, psychological, moral, or physical development of minors especially by presenting pornography or extreme or unreasonable violence (Article 19(1)), media contents that could damage the intellectual, psychological, moral, or physical development of minors may only be published in a manner that ensures, either by selecting the time of broadcasting or by means of a technical solution, that minors do not have the opportunity to listen to or watch such content under ordinary circumstances (Article 19(4)).

As the protection of minors is covered in a dedicated chapter that also covers rules pertaining to commercial communications, the content-related limitations presented in detail below

155 Article 1(9) of the PFA, Article 203(20) of the MA.

156 While split screen advertisements were not regulated under the RTBA, an authoritative decision of the authority allowed such advertisements subject to various requirements; see decision No 718/2002 (V. 8.) of the ORTT.

157 A Koltay, 'Reklámjog és szólásszabadság' *Médiakutató* 1 (2009).

and the application of relevant statutory provisions focus on the protection of fundamental constitutional rights, public interest, and consumer protection. Most of the cases discussed in relation to limitations based on consumer protection considerations cover product placement related issues. The reason for this is that product placement—introduced by the MA—is a fairly new field of law in Hungary, and extensive interpretation and guidance was needed regarding the application of the statutory provisions.

i. Content-Related Limitations Protecting Constitutional Rights

Among the rules of commercial communications, the MA repeats the above-mentioned obligation stipulated in the PFA to respect human dignity (Article 24(1)a), and also adds that commercial communications may not violate the dignity of national symbols.[158] Following the example of the AVMSD, the MA also stipulates that commercial communication broadcast in a media service shall not contain and shall not support discrimination on grounds of gender, racial or ethnic origin, nationality, religion or ideological conviction, physical or mental disability, age, or sexual orientation. The Press Freedom Act prohibits the publication of commercial communications violating religious or ideological convictions (Article 20(5)), and the MA acts stipulates that commercial communications may not express religious, conscientious, or ideological convictions, except for commercial communications broadcast in thematic media services with religious topics.[159]

I have found two cases in the case-law of the Authority pertaining to a content-related limitation introduced to protect a constitutional right, ie, the interpretation of the prohibition of 'advertisements that offend religious convictions'. While both regulatory procedures were conducted under the previous media act, the RTBA (materially in line with the relevant provisions of the PFA) prohibited the publication of commercial communications offending religious convictions in the context of radio and television advertisements, meaning that the relevant findings have remained authoritative until this day. The Authority adopted two decisions on the same subject (but at different times) regarding the following script of the advertisement broadcast by the media service provider:[160] 'Light was lit on the first day, and then the sky and land was separated. On the fifth day, water teemed with living creatures, and birds flew above the ground. On the sixth day, God created mankind. On the seventh day, you should buy *Sunday News*, too.' The Authority held in both cases that the quoted script was in violation of the above-mentioned statutory provisions, and issued a warning to the radio broadcaster that broadcast the advertisement. However, the latter decision was repealed by the Authority upon review and the Authority established that no violation occurred.[161]

The arguments of the decision(s) establishing the violation may be summarised as follows. The script of the advertisement is based on the Genesis described in the Holy Bible, the fundamental book of Christianity. The Bible is a highly distinguished book for Christians as it records the words of God himself. The writers recorded the words and message of God in their books, since

158 The first sentence of Article 24(1)h of the MA.
159 Article 24(1)g and the second sentence of Article 24(1)h of the MA.
160 Decisions Nos 416/2008. (II. 27.) and 1369/2008. (VII.15.) of the ORTT.
161 Decision No 1759/2008. (IX. 24.) of the ORTT.

God guided the writers of such books through His Spirit. The Authority established that the script of the advertisement was not a verbatim quote from the Bible, and did not contain any part that parodized the Bible. However, the script did imitate the style of the Bible, and re-used the Genesis described therein to promote a weekly paper, which fact may violate the religious conviction and feelings of Christians, primarily because the Bible—considered a fundamental holy book by Christians—was used by the broadcaster for ignoble non-religious or artistic purposes.

In the course of repealing the latter decision, the Authority—in addition to noting the lack of sufficient legal considerations to support the decision—argued that the decision was materially unlawful as it failed to take into account the rules and principles established by the CC and European law regarding the freedom of conscience and religion on the one hand, and the freedom of speech on the other hand, that could help clarify the constitutional meaning of the relevant provisions of the MA. Citing various decisions of the CC regarding the freedom of religious beliefs, the Authority concluded that an administrative order may not be based on denomination related arguments.[162] Thus, the provision laid down in the RTBA prohibiting the publication advertisements violating religious beliefs should be interpreted along the principles of the competing fundamental rights, ie, the freedom of speech and the freedom of religious beliefs. Since the Constitutional Court has yet to consider the relationship between these two fundamental rights specifically, the Authority relied on general findings of the CC regarding the limitation of the freedom of speech and on the relevant case-law of the European Court of Human Rights.

In this context, the Authority emphasized that, as understood by the European Court of Human Rights, the freedom of opinion goes beyond the freedom to communicate positive, harmful, or neutral information and views and—with due regard to the limits of the freedom of opinion—includes the freedom to express offensive, shocking, or irritating views as well.[163] The findings of the Hungarian CC are consisted with the above considerations, according to which 'The state cannot prohibit the expression or dissemination of certain views on the sole basis of their contents and may not declare certain opinions to be more valuable than others, because doing so would be inconsistent with the requirement of treating each person with equal dignity (such a prohibition would mean that certain groups of people would be prevented from expressing their personal convictions), and the exclusion of certain views would prevent any free, vigorous, and open debate that represents all relevant views even before the emergence of any kind of political discourse' (18/2004 (V. 25.)).

The Authority concluded from the above considerations concerning the freedom of speech and of religious beliefs that the questionability of religious values and the possibility to criticise, even to ridicule churches and religions is not only an important part of the freedom of opinion but also a cornerstone of the ideologically neutral state and of pluralistic democracy. These considerations

162 eg, the Authority referred to 8/1993. (II. 27.) AB, establishing that 'the state may not be associated with any church, religion, or religious community in an institutional manner and may not identify itself with the teaching of any religion.' According to 32/2003 (VI. 4.) AB, the separation of state and church means, among others, that regulatory decisions may not be based on the teachings of any denomination: 'With a view to ensuring the freedom of religious beliefs, including the freedom of operation of the various churches, it is the responsibility of the state to adopt rules regarding religions and churches that allow the churches to become parts of a legal system that is neutral for religious purposes.' The Authority also emphasised that the freedom of conscience and religious beliefs may be fully achieved in a state that is neutral ideologically.

163 For a summary, see, *Observer and Guardian v the United Kingdom* (26 November 1991; Ser A 216).

pertaining to fundamental rights are to be taken into account in the course of interpreting the relevant provision of the RTBA and, as a result, said provision may be applied in a rather narrow manner only. The Authority emphasised that, in theory, an advertisement might be unlawful because it violates religious beliefs, eg, because it advocates or suggests the inferiority or superiority of a religion, denomination, faith, or conscious conviction in comparison to other beliefs and convictions, or because it incites hostility or against or mocks a religious community or church. However, the Authority established that the advertisement described among the facts of the case remained within the boundaries of the law, as transposing a sacred object, text, or story into a secular / profane environment is not inconsistent with the statutory provisions in itself.

The Authority emphasised that the Bible is a fundamental part of European cultural heritage and has been frequently referred to by public discourse (and advertisements) since the Enlightenment. Advertisements feature religious references and sacred attributes on a regular basis. Frequently advertised products that refer to the saints and symbols of the Catholic Church (eg, foodstuff and beverages) are in circulation. Furthermore, foodstuff produced in line with religious requirements are frequently advertised and marketed via non-religious channels. The Authority found it certain that certain religious or conscientious convictions and sensitivities may be harmed by such advertisements, but the advertisements are nonetheless lawful. The Authority also noted that some advertisements may seem to be inconsistent with basic good taste (general opinion), but taking action against such advertisements is a task for the self-regulatory bodies, not for the Authority.

The self-regulatory bodies performed the task specified in the decision without delay, considering that the Code of Ethics in Advertisement was revised by the advertising industry within one year after the decision was adopted and the general advertisement prohibitions and limitations stipulate that religious symbols and motifs used in advertisements may be used within the boundaries of good taste,[164] and in a manner that is appropriate for the subject matter.[165]

ii. Content-Related Limitations Protecting Public Order

The Press Freedom Act stipulates that commercial communications presented in media content may not encourage behaviour detrimental to health, safety or the protection of the environment. As for the meaning of incitement to harmful behaviour, the above-mentioned Co-Regulatory Code of Conduct can offer guidance, according to which the message of the communication is to be examined, instead of the nature or usability of the product, to determine if it should be regarded as a recommended behaviour. Any behaviour that may damage the health of any person or persons can be harmful to health. Behaviours that are harmful to safety include behaviours that are harmful to the life or physical integrity of any person, as well as behaviours that are damaging to public safety. The prohibition of incitement to environmentally harmful behaviour provides protection to built and natural environment.[166]

164 Note that matters of taste may not be deemed relevant in the course of application of the law by the Authority, since taste related statements may be made as part of professional ethics proceedings, if at all.

165 Article 4(4) of the Hungarian Code of Ethics in Advertisement (30 September 2009).

166 K Gellén, *A kereskedelmi kommunikáció szabályozása a médiajogban* (Budapest. HVG–Orac, 2012).

Special content-related limitations concerning commercial communications promoting specific products and services serve public interests as well. The Press Freedom Act stipulates that media content may not contain commercial communications aimed to promote or present tobacco products, weapons, ammunition, explosives, gambling games organised without the permission of the state tax authority, prescription medication, and therapeutic procedures (Article 20(7)). Commercial communications concerning alcoholic beverages may be published subject to the restrictions set forth in the MA. According to the MA, commercial communications broadcast in media services and which pertain to alcoholic beverages (i) shall not encourage immoderate consumption of such beverages; (ii) shall not depict immoderate alcohol consumption in a positive light and refraining from alcohol consumption in a negative light; (iii) shall not show exceptional physical performance or driving of vehicles as a result of the consumption of alcoholic drinks; (iv) shall not create the impression that the consumption of alcoholic drinks contributes to social or sexual success; (v) shall not claim that the consumption of alcoholic drinks has a stimulating, sedative, or any other positive health effects, or that alcoholic drinks are a means of resolving personal problems; (vi) shall not create the impression that immoderate alcohol consumption may be avoided by consuming beverages with low alcohol content or that high alcohol content is a positive attribute of the drink (Articles 27(1)(b)–(c) and 27(2) of the MA). (Other content-related limitations set forth in the MA with a view to protecting minors are discussed in the section on the protection of minors.)

As discussed above, the act prevents undertakings that produce tobacco products, organise games of chance without official license, or produce other products, or provide services in relation to products that cannot be advertised from sponsoring media services and programmes (Article 24(2) of the MA). Programmes sponsored by an undertaking engaged in the manufacture or distribution of medicines, medicinal products, or the supply of therapeutic procedures may not promote medicines, medicinal products, or therapeutic procedures accessible only with medical prescriptions.

iii. Consumer Protection Limitations Regarding Sponsorship

An important consumer protection related to limitation on sponsorship is that media content published and sponsored in the media service may not encourage, call for, or discourage the purchase or use of products or services of the sponsor or a third party defined by the sponsor (Article 20(9) of the PFA). Two related cases may be representative of the practice of the Authority regarding the violation of the content-related limitation established by the Press Freedom Act.

In one case, the Authority imposed a fine of 800,000 forint on a commercial television channel, because three programmes (*Update Konyha*, *Babavilág*, *Babapercek*) violated the above-mentioned content-related limitation concerning sponsorship in a total of six times.[167] The undertakings sponsoring these programmes were also involved in product placement relating to the relevant programmes. Under relevant legislation in effect, these two types of commercial communication—ie, product placement and sponsorship—may be used at the same time in the same programme and with regard to the same product / service. However, in

167 Decision No 1788/2012. (X. 10.) of the MC.

such cases, the rules pertaining to both product placement and sponsorship must be followed as applicable. Among the facts of the case, the Authority established that:

– The manufacturer of Accu-Check Active Kit blood sugar meters was identified as the sponsor of three episodes of the programme *Update Konyha*, with the following text: 'Roche Magyarország Kft., partner in regular blood sugar checks, a sponsor of this programme, and the manufacturer of AccuCheck Active kits.' In the meantime, the blood sugar meter, the stickpin, and vegetables laid out in the form of a heart were shown on the screen, as well as the name of the device and of the manufacturer.
– One episode of both *Babavilág* and *Babapercek* referred to Ceumed Kft. as a sponsor both in the beginning and the end of the respective episode, with the following text: 'Ceumed, a sponsor of *Babavilág* and the distributor of the Infacol suspension.' In the meantime, Infacol suspension was shown on screen.
– Numil Kft. and its drink produced for children were referred to as sponsor in the beginning and in the end of the *Babavilág* programme, with the following text: 'Milumil Junior drink for children supports the immune system of children.'

With regard to the above-mentioned programmes, the Authority established that explicit reference was made to the product of the manufacturer / distributor identified as sponsor in the beginning and/or end of each programme; the direct relationship between the product shown in the programme and the sponsor was made clear to the viewers of the programme; the programme urged the audience to purchase the product. The Authority referred to the judicial understanding of 'incentive effect', which is already achieved by directing the attention of the audience.[168] The incentive effect was also achieved by all programmes through the extent and intensity of presentation. In the case of *Update Konyha*, some 50 seconds were devoted to cover the product and its features and benefits, and the product was presented in various means—on table, explained during use—during the programme. The respective segments of the programmes *Babavilág* and *Babapercek* were structured to present and describe the product of the sponsor in detail. (In the same decision, the Authority also imposed a sanction on the media service provider for breaching the form related requirements of product placement, as discussed in later on.)

In the second case, the Authority imposed a fine of 600,000 forint on the same media service provider due to the episodes of *Nagytakarítás* that violated the statutory provisions laid down in the Press Freedom Act regarding sponsorship five times in total.[169] Similarly to the previous case, this programme also mixed sponsorship and product placement. The message of the sponsor, Unilever Kft., was shown several times before, after, and during the programmes (eg, in the course of presenting the cleaned house): 'Nagytakarítás is sponsored by Domestos and Cif. Twenty years of experience. Unilever Magyarország Kft.', 'Nagytakarítás is sponsored by Cif', 'Nagytakarítás is sponsored by Domestos.' The Authority established that the reviewed programmes were structured to present the products of the sponsoring Unilever Kft., the products of the sponsor (Cif and Domestos) were shown as product placement during the programmes (use, during purchase, placed in various parts of the house), the direct relationship between the products and the sponsor was made clear to the viewers of the programme, and the programmes urged the audience to purchase the product, as explained

168 See the section on surreptitious advertisements regarding the judicial understanding of incentive effect.
169 Decision No 1951/2012. (XI. 7.) of the MC.

above. According to the courts, the mere act of drawing attention is sufficient to achieve an 'incentive effect', since it is the relevant event in encouraging purchase. The 'incentive effect' was also achieved through the extent and intensity of presentation. Based on the above considerations, the Authority established the violation of the content-related limitation applicable to sponsorship. (In the same decision, the Authority also imposed a sanction on the media service provider for breaching the form related requirements of product placement, as discussed in later on.)

iv. Consumer Protection Limitations Regarding Product Placement

Product placement is in fact a form of advertising where the advertiser pays for the display or mentioning its product or service or trademark in a programme (Article 203(68) of the MA). This form of advertising—transposed from the AVMSD and introduced by the MA—enabled media undertakings to utilise new financial resources to incentivise the production of locally produced programmes. As a general rule, the act prohibits product placement, but it is allowed in individual programmes subject to rather strict limitations. Product placement may be used in linear and on-demand television and radio media services, both in fictitious and non-fictitious programmes, but the complex rules pertaining to publication are applicable only to programmes produced by or upon the order of the media service provider.

According to the MA, product placement may be used only against (money) payment or similar (in-kind) service, and, in programmes aimed at persons under the age of 14 years, only 'free of charge', without any financial consideration. In the latter case, the Authority understands the term free that the manufacturer / distributor / provider of the respective product / service may not provide any financial consideration to the media service provider or production company beyond the mere act of making the goods or services available for the purpose of product placement free of charge ('props placement'). Of course, no act is made without consideration in the context of props placement, as displaying the goods / services has a financial value, and providing the given goods / services in return has a financial value as well. The Authority can rely on the provided contracts concluded by and between the advertiser on the one hand, and the media service provider or production company on the other hand, to determine if this requirement is met. If there is such an agreement, the next step for the Authority is to consider if the following strict requirements concerning product placement have been met.

The Media Act provides a positive list of programme categories where product placement is allowed. All three kinds of product placement (against payment, in-kind consideration, props placement only) are allowed in cinematographic works intended for showing in movie theatres (Article 203(11)), cinematographic works or film series intended for showing in media services, sports programmes (Article 203(61)), and entertainment programmes. Product placement may be performed as props placement only in any other programme, or if the works listed above are made for persons under the age of 14 specifically. Any and all product placement is prohibited in news programmes, political information programmes, programmes covering official events of national holidays, religious, and church programmes.

With regard to the fact that the use of product placement is allowed by the new advertisement regime, the MC found it necessary to issue a Recommendation on the application of rules

pertaining to product placement.[170] The Recommendation,[171] which is not a source of law, was developed by the MC in cooperation with media service providers and with due regard to the professional views of market actors, with a view to facilitating the interpretation of general statutory provisions and consolidating the method of applying the law, thereby helping everyone to understand and foresee the application of the law.

The content-related limitations on product placement—ie, the prohibition of unjustified emphasis and direct calls—is discussed below by presenting the relevant statutory provisions, contents of the Recommendation, and relevant cases. (The form-related limitations on product placement—ie, the obligation of the media service provider to provide information—is discussed in the section on form-related limitations.) The review of the relevant cases makes it clear that an established case-law in relation to this recently introduced field has yet to emerge. Several rulings have been adopted by courts that do not agree with the findings of the Authority in certain cases, and some proceedings have not yet been closed with final effect.

a. Prohibition of Unjustified Emphasis

According to the MA, programmes featuring product placement shall not give unjustified emphasis to the product so displayed, which does not otherwise stem from the content of the programme flow. In the view of the Authority, the statutory hypothesis is met where any piece of information of advertising value is communicated regarding the displayed product, if such communication is not justified in relation to the contents of the insert, and if doing so places an unjustified emphasis onto the displayed product with regard to the length of the programme that does not follow from the contents of the programme.[172]

The Media Council explained in the Recommendation that the unjustified emphasis is placed onto a product presented in a programme, among others, if the given product, service, reference thereto, or trademark thereof is shown in a programme or programme flow without fitting into the storyline of the events. The display intensity can be reviewed on an *ad hoc* basis only, taking into account the type and nature of the reviewed programme, and the content and topic of the programme may serve as basis for a decision as to whether displaying the product is realistic and justified by editorial considerations, and as to whether it fits into the storyline of the programme. Unjustified emphasis may be established, primarily on the basis of the frequency of appearance and the proportion of appearances to the length and nature of the given programme. The first group discussed below presents cases where the Authority found that the challenged programme segment / scene was specifically built

170 Under the authorization granted by Article 31(4) of the MA, the MC adopted the Recommendation by virtue of decision No 1048/2011. (VII. 19.), which was amended later by decision No 1151/2011. (IX. 1.).

171 With regard to such administrative normative acts constituting 'soft law', the professional literature and the case-law of the CC (60/1992 AB) established that such acts are not regarded as pieces of legislation and are not mandatory. However, the contents of the Recommendation are taken into account and applied by the Authority in the course of applying the law, without its decision being specifically based on the Recommendation itself. It should be noted that the Authority is not bound by the Recommendation in the course of its regulatory proceedings, but the Recommendation plays an obvious directional role regarding the official and voluntary application of the law.

172 In its decision No 1257/2011. (IX. 21.), the MC condemned a television broadcaster for placing unjustified emphasis onto a tabloid paper in an insert shown in a news programme of the broadcaster.

around the presentation of the product, while the second group gives examples where the display was otherwise unjustified with regard to the storyline.

Programmes Built around Product Presentation Specifically

The Authority established that the product placement was unrealistic and unfitting to the storyline in a reality show. In one episode, the characters were baking cakes, and viewers were shown the stages of preparing the cakes in the various scenes of the programme. The newspaper describing the recipe—ie, the object of product placement—was shown several times and was consulted by the characters frequently. The Authority held that showing the cover of the latest issue of the magazine in a clearly visible and legible manner, as well as the remarks made by the characters ('Let me make this amazing paper available for public viewing, this is *Blikk Konyhája*') was not fitting into the storyline of the programme. The Authority specifically condemned a scene where one of the characters was tasting the cookies, while another character was standing by and steadily holding the cover of the cooking magazine over in front of his upper body, so that all information relating to the newspaper was clearly legible. The Authority did not accept the arguments submitted by the media service provider claiming that the product was shown only for a short period of time, as part of the events of the programme, modestly, and in a manner justified by the storyline. According to the Authority, the product was not shown as a means of baking cookies, but *vice versa*, the programme section about baking was built around the presentation of the magazine, it was a means of presentation, and the showing of the cover of the paper did not facilitate the baking process.[173]

The television channel filed an appeal against the regulatory decision imposing a fine of 50,000 forint for violating the prohibition of unjustified emphasis, but both the court of first instance and second instance agreed with the arguments of the Authority regarding the emphasised appearance.[174] The court of first instance noted that the emphasis placed on the presentation is to be measured to the entire programme as well as to the other products featured in the programme. Other products were also shown in the programme in the context of baking cakes, but the cream and milk were presented as allowed by applicable legislation, ie, they were visible to the camera as it swept through the scene without placing any unjustified emphasis of those products. In comparison to this product placement, the cooking magazine was given unjustified emphasis in the scene condemned by the Authority. The court of second instance—in agreement with the Authority—found it unrealistic, functionless, and unjustified by the storyline that a character, who was leaning against a chair in one scene, is unexpectedly holding an open magazine after a cut. This scene did not follow from the events depicted so far and directed the attention of the viewers to the magazine in a manner that stood out of the storyline.

The Authority condemned and imposed a fine of 500,000 forint onto another television channel concerning a reality show based on similar reasons, due to presenting the prize

173 Decision No 111/2012. (I. 18.) of the MC.

174 See, judgment No 24.K.31.056/2012/3 of the Metropolitan Court as court of first instance, and judgment No 3.Kf.650.043/2013/4 of the Metropolitan Court as court of second instance.

vehicles by means of product placement.[175] The condemned programme placed unjustified emphasis onto the presented products by broadcasting a nearly ten-minute long segment about Chevrolet vehicles and by presenting the inside and outside of the vehicles in a strongly visual and verbal manner. After the players gave the vehicles a test drive, they returned to their residence and were asked to pick the Chevrolet vehicle that would be awarded to the winner as a prize. Selecting the prize vehicle after the test drive offered yet another opportunity to present the various types of the brand, meaning that the products were kept on screen for even longer. In the view of the Authority, the programme segment shown after the test drive in the residence was a repetition of the presentation of the products that gave the impression that *content was in fact structured around product placement,* as showing the Chevrolet vehicles the given was not justified by editorial considerations. The Authority established that the media service provider placed unjustified emphasis onto the presented products, and the segment was clearly designed to present the vehicles manufactured by Chevrolet.

In another case, the broadcaster kept a GreenPan pan on screen during an entire episode of a television healthcare programme, the presenter was wearing an apron featuring the GreenPan logo while presenting the pan, and, at the end of the segment, the GreenPan text was shown under the name of a lifestyle expert who was not independent from the manufacturer of the product. At the end of the segment, the presenter was wearing a cooking glove featuring the text 'GreenPan' while serving the food, and it was shown by the camera in a close-up in a clearly visible manner. In the course of covering the topic, the media service provider put the product in the forefront in a manner that was not justified by editorial considerations. Thus, the product was presented not as a tool in the segment, but *cooking the food was the means of presenting the product.* For the above reasons, the Authority established the violation of the prohibition of unjustified emphasis and obliged the media service provider to pay a fine of 100,000 forint.[176]

Similarly to the above-mentioned case, the Authority considered the fact that the media service provider communicated information about various products in several programmes (*Update Konyha, Babavilág, Babapercek*) to be product placement, and imposed a total fine of 800,000 forint due to the violation of the prohibition of unjustified emphasis.[177]

Other Emphasised Displays that Were Not Justified by the Storyline

In a related case, the Authority found the product placement to be emphasised without justification, because the product was shown in a manner that made it clearly recognisable to the average viewer, but unnecessarily, as showing the product did not follow from the structure or storyline of the programme, meaning that it provided additional content that exceeded the regulatory framework of product placement. In the given case, the programme was a television cooking programme, in the *Borajánló*, section of which a wine-connoisseur recommended wines to the food prepared during the programme.[178] The Authority was of

175 Decision No 972/2012. (V. 23.) of the MC.
176 Decision No 1541/2012. (VIII. 29.) of the MC.
177 Decision No 1788/2012. (X. 10.) of the MC, 10–12.
178 Decision No 513/2012. (III. 14.) of the MC.

the opinion that the wine bottle (product) was shown as part of the storyline when the wine-connoisseur discussed the characteristics of the wine and poured a glass of wine from the bottle standing on the table. However, the Authority condemned that *a stand-alone image was inserted* into the continuity of the programme section, which showed the wine bottles displayed on the table in an organised manner with their labels being clearly legible, as this section of showing the products was not justified by the storyline. The Authority warned the media service provider as a sanction, as it crossed the statutory limits of product placement by displaying the above-mentioned image, as it placed an emphasis on the displayed products that was otherwise not justified by the content of the programme.

The Authority also established that product placement was given unjustified emphasis when it was based on a short dialogue of a talk show.[179] The conversation with the guest of the programme included the following sentences: 'I did not know that even Superman drinks cola. Whatever, you need something to make you fly. But drinking cola on live television!') Then, the invited guest took bottle of cola—clearly a bottle of Coca-Cola—that was kept on a counter next to the glass of the presenter during the entire programme, and took a sip. The products of Coca-Cola are easily recognisable due to the unique design of their bottles. According to the Authority, the media service provider—which was warned as a sanction—exceeded the statutory limits of product placement, as *the conversation during the programme gave the impression of natural conversation* in the course of advertising Coca-Cola products, while the condemned scenes did not play any role in the storyline, meaning that tasting the beverage and engaging into the respective conversation was not justified in addition to showing the events of the programme. While the placement was rather short (only a few seconds) in comparison the the length of the entire programme, the Authority still found that it constituted unjustified emphasis due to the above-mentioned storyline reasoning, one the one hand, and because the product was clearly identifiable to the average viewer, on the other hand.

In another case (involving the judicial review of the decision of the Authority), the Authority imposed a fine of 750,000 forint onto a television channel, because it placed unjustified emphasis onto a family of cheese products during several days (on 11 occasions in total) in its morning talk show.[180] In certain scenes condemned by the Authority, the media service provider 'apparently' used the products of Milkana, while they were shown without reason and in an unrealistic manner during the presentation—eg, a Milkana banner was visible in the background during the entire interview with the wine dinner organiser, the camera took close-ups of the Milkana cheeses placed next to wine bottles, and, while the conversation focused on the wines of the Zala region, the various cheeses recommended with the wines were also discussed in detail. Furthermore, the brand name of the wines on the bottles were not visible, while several close-ups were of the Milkana products were shown, without being justified by the storyline. Milkana products were also shown in detail in the scenes covering foodstuff dipped in cheese, so that *the camera focused on the cheese products several times,* and *the return to the topic* of cheeses was capable of keeping the products of Milkana on the screen. Other condemned scenes included interviews where the media service provider included Milkana advertising surfaces (banner, refrigerator) in the

179 Decision No 1043/2011. (VII. 19.) of the MC.
180 Decision No 1519/2013. (X. 16.) of the MC.

programme as parts of the set. This act was rather offensive for artists and majors during the interviews, and stood out of the storyline. In the course of such interviews, the Milkana *advertising surfaces* did not relate to the relevant segments in any way, but *they were still visible during the entire period of the interviews*.

In the course of the regulatory procedure, the media service provider stated that the reviewed morning show was a live show where unexpected situations may arise promptly, and such situations may not be remedied retrospectively, and the interviewers and the interviewees both made professional mistakes as well. In this context, the Authority noted that the condemned violations consisted of not what was *'said'* during the programme, but of the method and frequency of the displays as described above. Furthermore, the Authority also stated that the television channel bears exclusive liability for the contents of the programme and may not place any liability onto the interviewees, eg, in the course of the regulatory procedure. The media service provider applied for judicial review against the decision, and the court of first instance expressed its unreserved agreement with the Authority after reviewing the recordings of the case.[181] According to the court, the media service provider displayed the Milkana products with unjustified emphasis, regardless to whether or not the products were mentioned in a conversation in any particular scene. In the section about the wine dinner and in the scenes concerning the cheesy dips, several pieces of information were mentioned about the products of Milkana, and the products were also given unjustified emphasis by the camera movement. Regarding the scenes where the banner and the refrigerator was used in the background as props, the court did not agree with the claim of the media service provider that the background cannot be changed for each and every programme section. The court believed that the background was set up in a deliberate manner so that the banner and the refrigerator would be visible on multiple occasions, as showing these components could have been eliminated by simply setting an appropriate camera angle and distance. The court emphasised the scene covering paleolithic diet that excludes dairy products, where the products of Milkana could have been in no way connected to the topic of the conversation, but the banner was still visible in the background during almost the entire time. The judgment of the court of first instance became final as no appeal was filed.

In a case where the subject matter was partially the same as the above-mentioned appearance of the banner, the judgment of the court of first instance reiterated the above considerations, and the court established that the Milkana banner and the Milkana refrigerator in the background was not fit for the contents of the interview on adventure parks.[182] The court dismissed the claim of the media service provider as unsubstantiated speculation that the viewers did not notice the appearance of the opposed product due to the quantity of information presented in the interview and to the use of the picture-in-picture method (images of the adventure park were shown in the lower left corner during the conversation); also, there would be no point in using providing lot of information in an interview and using the picture-in-picture method, if the viewers could not listen to other image parts simultaneously. The court agreed with the Authority in that the products of Milkana were given emphasis in the condemned programme during the presentation of the

181 Budapest Administrative and Labour Court judgment No 24.K.33.803/2013/4.

182 See decision No 1606/2013. (XI. 12.) of the MC, and Budapest Administrative and Labour Court judgment No 24.K.34.018/2013/5.

products, so the petition filed by the television channel for the annulment of the imposed fine of 180,000 forint was denied. The judgment of the court of first instance became final regarding the above-mentioned provisions as no appeal was filed.

b. Prohibition of Direct Calls

In the view of the Authority, product placement differs from classic advertisements in that the message of the advertisement is not presented in an advertisement block separated from the edited programme, with clear indication of its nature as advertisement, but the promoted product is integrated into the programme itself; the production uses the product—so that it becomes sensible to the audience—thereby promoting the product at the same time.[183] According to the MA, product placements—unlike classic advertisements may not call upon the purchase or rent of a product or the use of a service in a direct manner (Article 31(1)b of the MA).

A textbook case of direct calling was used in a programme where the television presenter, while flipping the pages of the magazine subject to product placement, said goodbye to the viewers with the following words: 'This was the second episode of *Wild* magazine here, on Rock TV, and hurry to read the paper after watching the show!'[184] However, in the view of the Authority, direct calls are not limited to verbal invitations as illustrated by the above example. As explained in the Recommendation in detail, direct calling includes any and all deliberate and clear—verbal or visual—invitation to purchase, promote, or use the goods or services affected by product placement, including—among others—the communication of the following information during the programme:

- commercial availability and/or price of the goods/services;
- features and advantages of the goods/services;
- the slogan of the products/services;
- statements taken from the promotion video of the goods/services.

The Authority established in another decision accordingly,[185] that, due to the nature of product placement, only communications exceeding mere mentions and visual displays may constitute an invitation to engage in commercial activity. According to the intentions of the legislator, such communications are inconsistent with the relevant statutory provisions only if they invite to purchase or use the presented product or service directly. However, this does not mean that the relevant statutory provisions may be violated by open and direct invitations only. In addition to direct calls, the Authority considers situations to be direct invitation to purchase where any such information is presented in relation to the goods or services displayed in the programme as product placement that facilitate the sales of and promote the goods / services in a manner similar to traditional advertisements. The provision of such information may consist of the publication of the commercial availability and price, or presenting the advantages and features of the respective goods/services.

For the purpose of understanding the statutory prohibition of direct calls, a case should be discussed where the Authority and the court of first instance interpreted the relevant statutory

183 Decision No 1788/2012. (X. 10.) of the MC.
184 Decision No 821/2012. (V. 2.) of the MC.
185 Decision No 1788/2012. (X. 10.) of the MC.

provisions differently. A case has already been discussed above where the Authority reviewed the issue of product placement in a reality show, where the displayed product was a cooking magazine.[186] In addition to the violation of the prohibition of emphasised presentation, the Authority also established the violation of the prohibition of direct calls, and issued a warning as a sanction, because the consumer price ('Only 195 forint') and a reference to the rich content ('65 recipes') was clearly legible on the cover of the magazine displayed on several occasions during the programme. The Authority regarded these as additional information that was suitable for promoting the product and inviting the viewers to purchase the magazine. In the view of the Authority, the media service provider would have acted in an acceptable manner if it did show the information on the cover of the magazine directly and multiple times.

In the course of the judicial review of the decision, the Metropolitan Court—acting as court of first instance—concluded that the media service provider did not violate the statutory prohibition of direct calls.[187] Based on the grammatical interpretation of the statutory provisions, the court established that the term 'call' used in the legislative text may consist of verbal expressions only, and that call must be direct as well to meet the hypothesis of the statutory norm. However, the Authority considered the visual display of information of marketing value to constitute a direct call. The call was not made verbally, and it was not direct either, since it did not invite to purchase goods or use services directly. The visual display was only suitable for promoting the product, so the invitation for the viewers to purchase the magazine could not have been more than an indirect call. The court also noted that the act provided an exhaustive list of the possible objects of such calls, ie, the call must be directed to the purchase or rent of the product or to the use of the service. Consequently, the statutory prohibition of direct calls may not be violated by the general promotion of a product by any other means.

The court of second instance agreed with the operative part of the judgment of the court of first instance, but on different grounds. In the opinion of the court of second instance, the court of first instance misunderstood the legislative text when it concluded that a direct call must be made verbally. Since a programme consists of a series of sounds and images, it is incorrect to conclude from the mere grammatical analysis of the term 'call' that a call must be made verbally, as such a conclusion does not follow either from the logic or from the purpose of the statutory provisions. According to the correct understanding of the statutory provisions, the prohibition applies to any and all displays created by any of the possible means of creating a programme that are directly suitable for achieving the purposes specified by the act, ie, for inviting to purchase or rent a product or make use of a service. A violation is committed where a direct call to purchase / rent / use a product / service is made beyond the scope of legally acceptable product placement, regardless to the applied means of programme production or to the visual or verbal means of display. The court of first instance acted incorrectly when it assigned a meaning to the term 'call' that eliminated the possibility of establishing a violation *ab ovo*.

According to the court of second instance, a violation can be established where the magazine is shown in a programme in a systematic manner that encourages purchase, piques

186 Decision No 111/2012. (I. 18.) of the MC.
187 Metropolitan Court judgment No 24.K.31.056/2012/3.

the curiosity of the audience regarding its content, and draws attention to the magazine with a view to purchasing it. However, the court of second instance—after providing an interpretation that is rather similar to that of the Authority as described above—ruled after watching the programme that its contents did not call to purchase the product directly. Thus, the operative part of the decision of the court of first instance was approved. The topic of the programme was that the characters on screen were baking cookies, so the presentation of a recipe magazine from which the recipes were selected did follow from the topic of the programme. According to the reasoning of the final judgment, the mere fact that a viewer with a keen eye may have noticed the price of the magazine and a reference to the 65 recipes inside when the cover was shown momentarily does not constitute a direct call to purchase the magazine.

Publication of the Commercial Availability and/or Price of the Goods / Services

In the cases presented below, the Authority established the violation of the prohibition of direct calls because the commercial availability and/or price of the goods / services were published, and/or the features and advantages of the goods/services were presented. In one case, the Authority established that certain pieces of information regarding a recently opened hardware store aired in the course of product placement in the morning talk show of a radio station violated the prohibition of direct calls and issued a warning as a sanction: 'Some people allegedly hinted that the GPS does show them here if they enter Malomkő utca 5; there are some crazy prices here; you can get a discount of 20,000 forint for your old TV, if you go in there now . . . this is an offer).[188] In the opinion of the Authority, providing the GPS coordinates of the store was sufficient information to identify the location thereof. Furthermore, the information pertaining to the promotions of the store, the 'crazy' discount prices, and the offer to trade in old television sets promoted the purchase in an open and direct manner, similar to traditional advertisements. By communication the above-mentioned information, the media service provider in fact reached the same result as if it invited the audience to visit the specified store directly.

In another case, a radio request show reported from an outside location, a store, as part of product placement. The customers of a recently opened underwear store were given the opportunity to request songs during the show. The Authority established that some pieces of information disclosed during the apparently natural conversation did in fact exceed the lawful limits of product placement.[189] The media service provider tried to carry out product placement by having the presenters state the street and number of the reporting location multiple times during the programme. The Authority found that stating the address of commercial availability was extra information through the publication of which the media service provider aired a direct call that promoted the purchase of the respective goods. With regard to the weight of the violation and to the fact that the radio station had not committed similar violations before, the Authority issued a warning against the media service provider as a sanction.

188 Decision No 1808/2011. (XII. 7.) of the MC.
189 Decision No 1809/2011. (XII. 7.) of the MC.

A Mixed Case: Presentation of the Commercial Availability, Features, and Advantages of the Goods / Services

The last case discussed in this context was also subject to judicial review. In this case, the Authority condemned the media service provider for presenting in detail the commercial availability and offered products of a confectionery presented as product placement.[190] The episodes of the television travel show reviewed by the Authority took the viewers to the 13th district of Budapest. The cultural and gastronomy oriented sightseeing presented some of the symbolic and traditional locations of the district, including cultural institutes, cafes, and a confectionery. The Authority established that the scenes covering the confectionary went beyond the editorial intention to present the confectionery as a defining business of Angyalföld. The Authority found that the segment—also identifying the commercial availability of the shop—was capable of arousing the interest of viewers in the cake-shop. By providing a detailed presentation of the offering of the confectionery, the media service provider directly called the attention of the viewers to purchase confectionery products. According to the Authority, the presentation of the confectionery was rather close to an advertisement in nature, and—notwithstanding the claims of the media service provider—the segment did not remain within the boundaries of an informative cultural programme.

The television channel applied for judicial review against the decision imposing a fine of 300,000 forint, both judicial fora—the court of first instance and the court of second instance passing the final judgment—took the side of the media service provider.[191] The court interpreted the applicable statutory provisions in the same way as the Authority; the court of first instance even specifically took into account the Recommendation of the MC when passing its judgment. After watching the footage, the courts concluded that the product placement presented in the programme did not cross the statutory boundaries, and the court of first instance established that it was even consistent with the Recommendation as well. According to the court, the presentation of the stocks of the confectionery did not constitute a direct call to purchase goods or use services in the context of the given programme, as it was strictly in line with the topic of the programme and was not given any emphasis during the gastronomy sightseeing in addition to what was justified by the content of the programme. Mentioning the district and street where the shop is located and showing a street sign as part of presenting the history of the confectionery is not sufficient to establish that the commercial availability of the shop was presented. The court of second instance agreed with the court of first instance, and added that the promotion of the products did not exceed the level that was justified by the storyline and the topic of the programme, without being regarded as a traditional advertisement or surreptitious advertising. The court did not agree with the Authority on the issue that the interview followed the characteristics and included the components of an advertisement, and exceeded the boundaries of an informative cultural programme as well.

190 Decision No 627/2013. (IV. 10.) of the MC.

191 See, judgment No 17.K.31.850/2013/3 of the Budapest Administrative and Labour Court as court of first instance, and judgment No 2.Kf.650.276/2013/5 of the Metropolitan Court as court of second instance.

D. Closing Thoughts

The statutory provisions discussed in the previous chapters regarding commercial communications pose several limitations on the freedom of the press. As a conclusion and in addition to the numerous rules limiting the freedom of the press, some thoughts are to be devoted to the provisions that protect the freedom of the press. Media service providers need to publish commercial communications for financial reasons, but they may also become exposed easily for the same reasons and their editorial independence may become vulnerable. Naturally, the general provisions protecting the freedom and independence of the press are applicable to commercial communication, as well (Articles 4(1) and 4(2) of the PFA). With a view to protecting the freedom of the press, the MA stipulates that persons who order the publication of a commercial communication and persons who have an interest in such publication may not exert editorial influence over the media service, except for the time of publication (Article 25). With regard to product placement, the act emphasises that the content and schedule of programmes featuring product placement may not be influenced so as to affect the responsibility and editorial independence of the media service provider (Article 31(1)a). Similar provisions apply to sponsors, who may not influence the media content or the publication thereof in a manner that could affect the responsibility or editorial freedom of the media content provider (Article 20(10) of the PFA).

In order to guarantee independence from politics, the MA lays down special provisions for sponsorship, and public service and community media services. According to those provisions, a political party or movement may not sponsor any media service or programme, and the name, slogan, or emblem of a political party or a political movement may not appear in the name or the displayed name of the sponsor (Articles 27(1)a and 27(4)). Presenters, reporters, or newsreaders appearing regularly in the news and political programmes broadcast in public and community media services may not appear or play a role in political advertisements.

Naturally, the protection of editorial independence is closely related to editorial responsibility. Regardless to the expectations of advertisers, media service providers must exercise independent editorial control over the contents of the media service. The media service provider is exclusively entitled to decide upon the content of its media services, ie, to determine what is broadcast when, and how the content is edited in the programme. Given the exclusivity of this right, the media service provider is also fully liable for the content.[192]

IX. Restriction of the Freedom of the Press in Media Law Practice in the Interest of the Protection of Minors

A. Constitutional Protection of Minors

Hungarian Constitution has been guaranteeing the right of children to protection and care for more than a quarter of a century. Constitution declares that 'In the Republic of Hungary all children have the right to receive the protection and care of their family, and of the State and society, which is necessary for their satisfactory physical, mental, and moral

192 Decision No 218/2012 (II. 1.) of the MC.

development' (Article 67(1) of Act XX of 1949). In its resolutions, the CC, the body entrusted with the task of interpreting the constitution, expounded the contents of this law imposing obligations for the society and the state in order to ensure the satisfactory physical, mental, and moral development for children. The Constitutional Court with its respective resolutions charted the scope for action by the Hungarian law enforcement bodies, including the media authority and the courts, with constitutionally binding force, and providing a frame of reference for the justification of law enforcement decisions. Since the object of media law protection is a constitutional provision, it is the jurisprudence of the CC that governs the process of ascertaining the substance of the right that has been violated.

Numerous resolutions of the CC dealt with the contents of the constitutional provision specifying the fundamental rights of children. The Court declared that children are human beings as well, and have the same constitutional fundamental rights that are guaranteed to everyone else, however, in order to ensure that they are able to exercise the entirety of these rights, they must be guaranteed all the conditions required for becoming an adult, according to their current age. Hence, the above quoted provision of the Constitution focuses on the fundamental rights of children, however, at the same time, it also sets the fundamental obligations of the family (parents), the State, and the society (995/B/1990 AB, 1993, 515, 524 AB).

In connection with the protection of the child, the CC established the obligation of the State to protect institutions in view of the above provisions and also of further constitutional provisions under which the Republic of Hungary protects the institution of family and the interest of the young people, furthermore it pays particular attention to their livelihood security, education, and training (Articles 15 and 16 of the Constitution). At the same time, in the CC's interpretation, the form, way, and extent of the State's obligation to protect institutions cannot be derived from the constitutional provision (731/B/1995 AB; 1995, 801, 807 AB).

In its decision analysing the relationship between the child's right of association, and its right for a proper physical and mental development (21/1996 (V. 17.) AB, 1996, 74, 80 AB), the CC established that the child's right to receive a protection and care from the State necessary for its proper bodily, mental, and moral development provides the basis of the State's obligation to protect the development of the child. Under the Constitution, the State has to defend the child, in addition to the effects harmful to its development, also from risk taking where the child is unable to recognise and assess the options available (due to its assumed bodily, mental and social maturity) or the consequences of its choice to its own personality, and later life and social inclusion. This decision furthermore explained that 'for children . . . the Constitution itself and the international agreements establish the State's obligation to defend the child's development path from dangers and risks, in order to enable it to prepare for the responsible and informed decision-making as soon as its maturity, assumed by its age, makes it capable to do so.'

In connection with the institution of the termination and suspension of parental control, it explained that the child's right imply a natural limitation on the parental rights enshrined in the Constitution (Article 67(2)), since the child is entitles to protection and care from both its family and the society. Where parents misuse their rights and gravely compromise the child's right with their attributable conduct rather than protecting and caring for it, the State must protect the child against the parent itself (429/B/2001 AB; 2005, 987, 992 AB).

B. Restriction of the Freedom of the Press in the Interest of the Protection of Minors

It is an important question in respect of all constitutional fundamental rights whether they may be limited at all and if so, to what extent, and what considerations should the definition of priorities be based on in the event of their collision. In respect of the freedom of expression and, as part of it, the freedom of the press, this question is especially significant, as these freedoms are among the fundamental values of democratic society.

According to the position of the CC, it does not follow from this privileged status of the freedom of expression that this right—similarly to the right to life and human dignity—is illimitable; however, it does entail that it may yield to very few rights only, ie, the laws that limit the freedom of expression should be interpreted restrictively (30/1992 (V. 26.) AB). In the practice of the CC, the freedom of expression may be restricted in the interest of the right of children to protection, being an inviolable constitutional right. In this Part, I present the media law provisions restricting the freedom of press in the interest of the protection of minors, and their assessment by the CC, in the order of their generation.

i. The Constitutional Court's Assessment of the Provisions of the Radio and Television Broadcasting Act Protecting Minors and Restricting Freedom of the Press

The first piece of media legislation containing provisions for the protection of minors was the RTBA. Albeit this Act was effective until 31 December 2010, it makes sense to review the relevant provisions it brought along since the current regulation is based on these. Furthermore, the jurisprudence that matured under the RTBA is authoritative to date in respect of collisions between the constitutional rights of children and the freedom of the press, when the issue at hand is whether the freedom of the press may be restricted and, if so, to what extent.

As of the entry into force of the RTBA in 1996 until its amendment effective as of 15 October 2002, the protection of minors against electronic media took place by temporal restriction on the broadcasting of programmes harmful to the development of minors. The Act initially set two categories of programmes subject to restrictions. A programme harmful to the development of the minors' personality could be broadcast between 11 pm and 5 am, providing that the audience's attention was drawn to this fact before the start of the programme flow. Publication of a programme flow severely harmful to the development of minors was fully banned (Article 5(4)). The Act banned publishing images or sound tracks displaying violent behaviour as an example to be followed in programme flows for minors Article 5(3), and programmes presenting application of violence as end in itself as an example to be followed, and programmes displaying sexuality as end in itself in the public service and public programme provision Article 24(6).

Initially, the RTBA failed to provide for the application of pictograms, however, from 15 March 1999, the national commercial televisions introduced self-restricting rules. Broadcasters voluntarily undertook not to broadcast before 8 pm any programme flows requiring age limitation; and after 8 pm, they display a pictogram for such programmes. They applied two types of pictograms, viz, the blue triangle indicated programmes not recommended for under

14 years of age, and the red dot indicated those recommended for above 18 years. Broadcasters themselves classified their programmes, as they deemed fit; the authority could not exercise control with regard to compliance with the rules undertaken voluntarily. However, the fight for rating soon pushed the measures undertaken in the interest of minors to the background. In the televisions' catalogues of programmes violence, sexuality, and strong vulgar language became more and more frequent, in order to make the experience of watching telly more exciting and shocking. The research carried out by the authority (then the ORTT) in 2001 on television content harmful to minors concluded that self-regulation is not sufficient, and top-down legal steps are required.[193]

Against this background, a new Chapter was introduced in the RTBA, with the effect of 15 October 2002, on the protection of the minor (Heading 1A, Articles 5/A–5/F). The Statement of Reasons to the draft law amending the RTBA explained the necessity of this addition with harmonisation, namely with the introduction of the new requirements from Directive 97/36/EC into the existing legislation.[194] Article 5/A of the new Chapter laid down a rating obligation to the broadcasters before the airing for all programmes they intended to publish. Accordingly, programmes had to be classified into categories I–V, depending on their hazard to minors. This rating obligation has not covered previews, news programmes, programmes on actual events, sport programmes, and advertisement, but previews could not be aired in a period when the relevant programme it promoted could not be aired, and the other listed programmes also could not be aired in a period when their publication was not allowed had they been rated according to their content. Article 5/B laid down the criteria for classifying a programme into a category; Article 5/C indicated the conditions for publication for each category.

The restriction on airing is stricter or less strict (or a ban) depending on what extent the relevant programme is suitable to disadvantageously influencing the development of minors. Articles 5/D and 5/E of the RTBA provided for airing in accordance with the category, furthermore on their display throughout the programme in the form of a pictogram; furthermore they also provided for the indication of the programme rating also for the press product publishing the programme schedule of the television broadcaster.

The above provisions ensured that both minors and their parents have the opportunity to become aware of the harmful content in the programme presented and to decide, against this backdrop, whether they wish to watch the relevant programme or allow the underage child to watch (listen to) that programme. Article 5/F authorised the Authority to set out the detailed criteria for each category and the method of communicating the rating in its resolution, mandatory for its own procedure. Furthermore, the RTBA authorised the authority to take action against broadcasters that violate the provisions of the Act (Article 112(1)). The above referred provisions jointly provided the basis for the action of the Authority for the protection of minors, ie, the possibility to initiate an administrative proceeding against the offender broadcaster.

193 Sz Szilády and E Baranyai, 'A kiskorúak védelme és a televízió' *Médiakutató*, 3 (2002).

194 Directive 97/36/EC of the European Parliant and of the Council of 30 June 1997 amending Council Directive 89/552/EEC on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the pursuit of television broadcasting activities; see new Article 22 of the Council Directive 89/552/EEC.

Interestingly, the above outlined case of the restriction to the freedom of the press was challenged at the CC from the perspective of the parents' rights rather than from the perspective of editorial freedom. The applicant requested the declaration of unconstitutionality and the annulment of the Chapter on the protection of minors of the RTBA with the justification that the challenged provisions (on the one hand, by the classification of programmes into categories, and on the other hand, by displaying these categories throughout the programme by pictograms) deprive the parents from the right to judge themselves, which programmes influence the development of their children harmfully, and through this, the parents' constitutional right to choose the form of education given to their children. The applicant also suggested that displaying pictograms generates the perception of censorship, however, there was no indication in the application to which Article of the Constitution is infringed in this context and on what grounds. According to the applicant, due to the challenged provisions also the right to the privacy of the home is infringed since displaying the pictograms on screen make the programmes unenjoyable.

The Constitutional Court found the motion to be unfounded (1123/B/2005 AB). In the Constitutional Court's view, in this case the challenged provisions of the Radio and Television Broadcasting Act must be examined primarily based on the fundamental constitutional rights of children (rights required for proper mental and moral development) rather than on the basis of the parents' rights (their right to educate). The Constitutional Court upheld that the above described Articles 5/A to 5/F of the RTBA contain no restriction to either to the rights of the children as enshrined in the Constitution or to the rights of parents to educate (they establish no legal obligations to the parents or the underage children) since they require only the broadcasters to classify the programmes according to the above categories, to publish this appropriately, and to display it on the programme. The warnings displayed in the previews and the pictogram displayed in the programme merely serve as information to parents whether the relevant programme is suitable to influence the development of minors in a negative way. These provisions do not deprive the parents from the right to decide independently, as part of their right to educate, to allow their underage child to watch (listen to) the programme, or to prohibit it. In addition to the information to parents, the above awareness raising differentiation of programmes (potentially) helps minors to identify clearly, when selecting programmes, programmes that are suitable for their physical, mental, and moral development. On the basis of this, the CC upheld that the challenged provisions of the RTBA are not contrary to the Constitution and therefore it dismissed the application in this regard.

The Constitutional Court upheld, furthermore, that the other arguments brought up by the applicant as constitutional arguments (namely that the challenged provisions of the RTBA infringe the privacy of the home; the continuous display of pictograms diminishes the quality of programmes shown by broadcasters and as such, it forces buyers to buy a defective product; on the basis of the royalties included in the price of the blank VHS cassettes and DVDs, the buyers acquire the right to record the motion pictures broadcast in the original quality, without disturbing signs), furthermore that there is no appraisable constitutional law correlation between the challenged provisions of the RTBA and the provisions of the Constitution upon which the applicant relied (Articles 8(2) and 59(1)). Since the challenged provisions of the RTBA and the arguments in the motion fail to contain any disturbing or interfering conduct under the above with regard to the right of the user of a specific home, the CC therefore dismissed this part of the motion due to the lack of constitutional links.

ii. The Constitutional Court's Assessment of the Provisions of the Press Freedom Act Protecting Minors and Restricting Freedom of the Press

The Press Freedom Act distinguishes between two types of media content harmful to minors; one of them could materially damage minors, the other could endanger their intellectual, mental, moral, or physical development. Under the PFA, media content that could materially damage the intellectual, mental, moral, or physical development of minors, especially by broadcasting pornography or extreme or gratuitous violence cannot be published (i) in linear media services; (ii) may only be published in on-demand media services in a way ensuring that minors normally are unable to access it; (iii) may only be made available in press products in a manner that prevents minors, by the application of an appropriate technical or other solution, from accessing such content (if the application of such solutions is not possible, the given media content may only be published with a warning label informing of its possible harm to minors; Article 19(1)).

Media content in linear media services that could damage the intellectual, mental, moral, or physical development of minors may only be published in a manner that ensures, either by selecting the time of broadcasting or by means of a technical solution, that minors do not have the opportunity to listen to or watch such content under ordinary circumstances (Article 19(4)). Article 21 of the 2012 Amendment of the PFA enshrined the Paragraph under which minors may not be presented in media content in a manner that may substantially jeopardise their mental or physical development corresponding to their respective ages (Article 19(4)a). The further detailed rules on the protection of minors against media content are laid down separately, in the MA, pursuant to the Press Freedom Act (Article 19(5)).

The constitutionality of the new rules brought along by the Press Freedom Act in 2011, amongst others, the provisions for the protection of minors, were examined by the CC in that year. Below I describe the relevant provisions of the Decision 165/2011 (VI. 20). The applicants challenged the substantive requirements in the Press Freedom Act for the protection of minors with regard to press products, namely, in their view, for (printed and online) press products, that control is appropriately ensured by the private and criminal law protection for individual breaches of rights, and there is no reason supporting content control by the Authority in constitutional terms. That is, as a result of the new legislative provisions, the Authority (the MC) supervises compliance, also covering printed and online press products, with the requirements set out in Articles 13–20 of the PFA, including the provisions protecting minors (Article 144(1) 182c). Although the CC had to decide whether the content-related limits in Articles 14–20 of the PFA (including the provisions protecting minors) are necessary and proportionate in view of the freedom of the press for printed and online content, for the content limitations protecting minors, the CC decided, by reinforcing its previous practice, that this regulation is constitutional for all media content.

The Constitutional Court decided on the constitutionality of the PFA's rules on the protection of minors by considering that this limitation is of a different nature to the rules in the PFA for protecting human dignity and banning incitement to hatred. The legislator has not classified content harmful to minors as offending in themselves—apart from the most extreme cases in linear media services; it only restricts the manner of their publication in such a way that, as far as possible, minors cannot access it. Content and formal limits placed on the editors of media content are based on public morality, and in a specific and

individually recognised form. Apart from the obvious parental responsibility towards minors, its constitutional basis is provided by the norm under which the State is required to take its part in providing the protection and support required for ensuring their satisfactory physical, mental and moral development (Article 67(1) of the Constitution).

The Constitutional Court explained that the obligation of the State to protect institutions—beyond the terms of the Constitution—is based on numerous international documents. The principal one of these is the Convention on the Rights of the Child, dated on 20 November 1989 in New York.[195] Under this Convention, States Parties recognise the important function performed by the mass media and shall ensure that the child has access to information and material from a diversity of national and international sources, especially those aimed at the promotion of his or her social, spiritual and moral well-being, and physical and mental health. The parties to the Convention undertook to develop appropriate guidelines for the protection of children from information and material injurious to his or her well-being (Article 17). They commit themselves to the child's right to information being restricted, even for harmful content, only by law (Article 13), and they undertook to take every suitable measure to protect children from physical and mental violence (Article 19(1)).

Under the European Convention on Transfrontier Television, dated in Strasbourg on 5 May 1989,[196] it is the responsibility of media content providers, in addition to the norms related to the broadcasting of advertisements, that programmes capable of negatively influencing the physical, intellectual, or moral development of children and adolescents cannot be broadcast at a time when children and adolescents presumably can watch them. The responsibility of audiovisual broadcaster is similar under the law of the European Union. In recital (60) and Article 27, Directive 2010/13/EU of the European Parliament and of the Council of 10 March 2010 emphasises the need, importance, and possible tools to protect minors.

The state obligation to protect minors, based on the Constitution, competes with the fundamental right to freedom of the press. The protection of minors is ultimately based on 'public morals', the concept and content of which vary by time and place. The law and the interpretation of the law, and law enforcement obviously cannot be separated from the moral perception of the medium in which it is to be enforced. Despite the changing content of public morality, in the European culture and in European type democracies, the views on the protection of children can be considered uniform, both in terms of public views and in the law. However, in this case, this moral imperative is emphasised by the fact that the international community beyond doubt advocates the primary interest of children, even at the expense of restricting the right to freedom of the press. The Constitutional Court therefore declared that it does not review the content, foundedness and appropriateness of this moral imperative and it accepts its restrictive nature towards the freedom of the press. The Constitutional Court referred furthermore to its decision made in this subject as analysed in the previous chapter (21/1996 (V. 17.) AB and 1996, 74 AB, 82–83), thus reinforcing its content. Hence, the CC declared that the restriction on the publication of media content materially harmful to the development of minors is not considered as disproportionate intervention by the legislator for any media content.

195 Promulgated by Act LXIV of 1991.
196 Promulgated by Act XLIX of 1998.

iii. Provisions of the Media Act Protecting Minors and Restricting Freedom of the Press

In this sub-chapter I present those detailed rules in the MA that were established, on the basis of an authorisation granted in the Press Freedom Act, for the protection of minors against media content. The current Act devotes a separate chapter, amongst the requirements on the content of media services and press products, to the protection of children and minors, in connection with the age rating and airing of programmes and, in addition, it contains provisions protecting minors in the chapter on commercial communications.

a. Age Rating and Publication Rules

Similarly to the previous media act, the MA also sets a rating obligation for linear media service providers (with the exception of news programmes, political programmes, sports programmes, previews and the advertisements, political advertisements, teleshopping, social purpose advertisements, and public interest announcements); however, it introduced one more category in addition to the existing five categories, by dividing the under 12 category in two: Category I shall remain to include the programmes which may be viewed or listened to by persons of any age.

(I.) The newly introduced Category II shall include those programmes which may trigger fear in persons under the age of six or may not be comprehended or may be misunderstood by such viewers or listeners owing to their age. These programmes shall be classified as 'Not recommended for audiences under the age of six', and shall not be aired between programmes intended for persons under the age of six,[197] but may, at any time, be aired using the proper rating.

(II.) Category III shall include those programmes which may trigger fear in children under the age of twelve or may not be comprehended or may be misunderstood by them owing to their age. These programmes shall be classified as 'Not recommended for audiences under the age of twelve', and shall not be aired between programmes intended for persons under the age of twelve, but may, at any time, be aired using the proper rating.[198]

(III.) Category IV shall include programmes which are *capable*[199] of impairing the physical, mental, or moral development of persons under the age of sixteen,

197 In decision No 1260/2013 (VI. 24.) of the MC, the Authority ordered the broadcaster subject to the procedure to refrain in the future from the infringement, in view of the fact that it published programme blocks consisting of several episodes of *Kedvenc kommandó* and *Andersen, a mesemondó*, classified into age rating category II, between programmes belonging into age rating Category I. See also, decision No 673/2013 (VI. 17.) of the MC.

198 There is a further rule stipulating that the preview of a programme classified into Category III may not be aired during the interval of or immediately prior or subsequent to a programme intended for persons under the age of twelve (Article 10(1)g of the MA).

199 Both the earlier media act and the MA slays down hazard facts by using the term 'capable', ie, the establishment of the infringement is not conditional upon the outcome. Accordingly, in the case law, it is not the actual effect of a programme on minors that needs to be examined, but whether the published scenes can be capable of influencing the healthy development of minors in a negative manner (Budapest Court of Appeal judgment 3.Kf.27.178/2006/4., Budapest Metropolitan Court judgment 24.K.31492/2005/5., Budapest Metropolitan Court: judgment 8.K.33371/2008/6.).

particularly because they refer to violence or sexuality, or are dominated by conflicts resolved by violence. It is worth noting that the relevant list in the law is not exhaustive but exemplary (it is true for the provision on both age categories V and VI). These programmes shall be classified as 'Not recommended for audiences under the age of sixteen', and may be aired between 9 pm and 5 am using the proper rating.

(IV.) Category V shall include programmes which may impair the physical, mental, or moral development of minors, particularly because they are dominated by graphic scenes of violence or sexual content. These programmes shall be classified as 'Not recommended for audiences under the age of eighteen', and may be aired between 10 pm and 5 am using the proper rating.

(V.) Category VI shall include those programmes which may seriously impair the physical, mental, or moral development of minors, particularly because they involve pornography or scenes of extreme and/or unjustified violence, which cannot be aired in linear media services. (Articles 9(1)–(7) of the MA.)

Similarly to the RTBA, the MA does not extend the classification obligation to previews, furthermore to news programmes, political programmes, and sports programmes, as well as to advertisements, political advertisements, teleshopping, social purpose advertisements, and public interest announcements. However, previews cannot be aired in a period when the relevant programme it promotes cannot be aired, and the other listed programmes also cannot be aired in a period when their broadcasting is not allowed had they been rated according to their content (Articles 10(1)f and 10(1)h of the MA).

In linear media services, a programme can only be published in accordance with its category; as a main rule, upon the start of is airing, its rating must be communicated, with the exception of radio media services, where programmes in categories II and III are aired between 9 pm and 5 am, and programmes in categories IV and V between 11 pm and 5 am (Articles 10(2)–(3) of the MA).

In linear audiovisual media services, at the time the specific programme is aired, a sign corresponding to the rating of the programme shall also be displayed in the form of a pictogram in one of the corners of the screen so that it is clearly visible throughout the entire course of the programme.[200] The pictogram shall indicate with numbers the age group affected by the given category. (For programmes in category I, no sign needs to be indicated; for linear radio media services no permanent signs need to be used. Article 10(4) of the MA) Similarly, the rating of each and every programme shall be displayed in a conspicuous manner in the press product specifying the programme schedule of the media service provider and on the website, non-interactive teletext and teletext of the media service provider, if any (Article 10(7) of the MA).

The Budapest Court of Appeal declared in numerous judgments that the provisions on rating, airing times and the permanent display of the pictogram jointly serve the protection

200 Pursuant to Article 10(5) of the Media Act, the continuous display of the pictogram may be waived, provided that (a) the programme classified as Category II or III is aired between 9 pm and 5 am; (b) the programme classified as Category IV is aired between 10 pm and 5 am; or (c) the programme classified as Category V is aired between 11 pm and 5 am. In this case, the sign corresponding to the rating of the programme shall be displayed when the programme begins, and at the time the programme is continued following a commercial break.

of minors, and it follows that all these rules referred to must be enforced uniformly and in accordance with each other. Thus, according to the court, an infringement takes place when the broadcaster airs the relevant programme at a time corresponding to the age rating, but its category is not set on the basis of the correct rating for the protection of minors.[201]

Here it is to be noted that where a programme infringes an absolute ban on broadcasting, eg, it infringes the statutory provision on presenting minors (Article 19(4a) of the PFA), violates human dignity, is capable of incitement to hatred, or depicts child pornography, the infringement of the provisions on the age rating of programmes and manner of publication cannot be declared in parallel with this, since the classification provisions only apply to content that can be published legally; they do not ban publication but regulate the manner and timing of it (and for age rating category VI, also its location).

The Authority published the Classification Recommendation, based on the respective powers granted to it under the MA, on the governing principles of the age rating classification of media content, the signals applicable prior to and during the broadcasting of the individual programmes and the manner of the communication of the rating.[202] The Classification Recommendation is not binding but its application can assist media service providers in complying with the statutory norms. Where a media service provider finds that even the Classification Recommendation fails to provide sufficient guidance on the appropriate classification, the Authority shall decide, upon request, on the classification of a programme. It is to be noted that it shall not qualify as a violation of the classification rules if the media service provider rates a programme into a higher category than would be required pursuant to the above provisions (Articles 9(8)–(10) of the MA).

The age classification and publication rules shall not be applied if the media service contains the programme in an encrypted form and decryption may only be executed by using a code, which the media service provider or the media service distributor only made accessible to subscribers over the age of eighteen, or which uses another effective technical solution to prevent viewers or listeners under the age of eighteen from accessing the programme. The Media Council issued a recommendation in respect of effective technical solutions subsequent to holding a public hearing (Article 10(6)).

Media service providers providing on-demand media services are subject to the statutory age rating obligation only for categories V and VI. The media service provider or the media service distributor (distributing the given service) of an on-demand media service shall use an effective technical solution to prevent minors from accessing its programmes classified as Category V or VI programmes. For the relevant efficient technical solutions, the above mentioned recommendation by the MC is applicable (Article 11 of the MA).

201 Budapest Court of Appeal judgment 2.Kf.27.164/2005/5. For an example of a related case, see, decision No 2011/2012. (XI.14.) of the MC, where the Authority warned one of the television stations that the motion picture *Ironweed* (1987, Héctor Babenco) was classified into category III rather than to category IV, although the film was aired at a time corresponding to category IV. However, in view of the fact that the previews of this film were not aired at the appropriate time, the Authority imposed a 200,000 forint fine on the television station.

202 The final text of the Recommendation was adopted and its publication on the website of the MC was ordered by decision No 1037/2011 (VI. 19.) of the MC. Furthermore, screen fitting masked TGA format images prepared by the MC for various aspect ratio combinations that the media service providers can use for indicating the age rating, and child friendliness of programmes can also be found on the MC website.

b. Rules Relating to Commercial Communications

Some of the restrictions on commercial communications serve the protection of minors, who, due to their age, are more vulnerable and more easily influenced and deceived than the average consumer. The advertising industry considers children as a separate consumer segment, and they seek to use their suggestibility, and also to influence adults via them. With the convergence of infocommunication services and consumer goods, media content reaches an increasingly wide range of minors and so the protection of children against harmful content is of primary importance.

In this regard, it is to be highlighted that not only the MA but also Act XLVIII of 2008 on the basic conditions of and certain restrictions to economic advertising activity (Commercial Advertising Act) contains provisions protecting minors from the harmful effects of commercial messages, limiting the freedom of the press. The Commercial Advertising Act (CAA) puts a general ban on commercial advertising that actually harms or is capable of negatively influencing the physical, emotional, and moral development of minors, including, in particular, advertisements suggesting or depicting violence, sexuality, or the key element of which is a conflict resolved in a violent manner. It is forbidden, furthermore, to publish any advertisement depicting a minor in a dangerous, violent situation or in a situation emphasising sexuality (Articles 8(1)–(3)).

Moreover, more general rules on specific subjects also serve the protection of minors, such as those banning pornographic advertisements, and advertising sexual services or goods for sexual inducement (Articles 9(1)–(3)), firearms and tobacco products (Articles 14 and 19). In the interest of the minors' moral development, the CAA bans advertisements inviting this age group to participate in gambling; and it prohibits the publication of any gambling-related advert in press products devoted to minors (eg, a TV channel for children). Under the CAA, it is forbidden furthermore to publish any advertisement for alcoholic beverages to children and young people, or such an advertisement depicting children or young people (Articles 18(1)a–b). The Media Act also contains the above mentioned rule with regard to commercial communications published in media services; moreover, it repeats the other restrictions of the CAA on alcoholic beverages, not specifically targeted at young people but the protection obviously covers them (Article 24(2)).

For the protection of minors, the MA puts a general ban on commercial communications directly calling them (i) to buy or hire a product or use a service; (ii) to persuade their parents or others about the activities listed in the previous (i) subsection. Their lack of experience and credulity due to their age must not be exploited, nor their confidence in their parents, teachers and other people be misused. Furthermore, the MA repeats the theorem of the CAA on the presentation and depiction of minors by forbidding the unjustified depiction of minors in dangerous situations in commercial communications (Article 24(1)c–f). In programmes expressly targeted at minors under 14 years of age, product placement is allowed only as the placement of accessories (Article 30(3)b).

As a programme structuring limit, the MA furthermore prohibits linear media service providers from interrupting a programme targeted for under 14 and not longer than 30 minutes with advertisements or teleshopping (Article 33(3)b). In the previous Section, we already mentioned the programme structuring limit, ie, that commercial communications may not be aired at such times when it is foreseeable that these would not be allowed to be

aired if they were provided with a proper rating based on their content. To close this subchapter, I present a case related to this programme structuring limit.

In the case at hand,[203] the Authority initiated a procedure against a radio media service provider due to broadcasting the advertisement of a shop selling sexual aids. In its declaration made in the procedure, the media service provider stated that, in the advertisement for the shop, the shop itself was promoted, but no actual name of a product sold in the shop was mentioned; therefore, the media service provider did not see it necessary to classify the advertisement into category IV when starting the advertising campaign. However, the Authority considered that an indirect reference was made in the advertising spot to sexuality, because it promoted a shop selling goods suitable for sexual inducement, and on the basis of its content it would have belonged into category IV, and could have been published between 9 pm and 5 am (Articles 9(5) and 10(1)c). In view of the lesser gravity of the infringement and the lack of repetition, the Authority applied only a warning against the radio station as a legal sanction.

C. Classification in Practice

Most of the cases in connection with the media law provisions aiming at the protection of minors were brought along in connection with the infringement of the age rating and publication rules by the broadcaster; therefore, I provide insight into the law enforcement practice by presenting some relevant cases. These cases are framed by the description of the Authority's Classification Recommendation, which summarises the criteria outlined during the years since the category system was introduced, ie, during the scope of the earlier media act. This Classification Recommendation relies on the Authority's earlier classification position adopted under the RTBA,[204] but it is more detailed in numerous aspects and also uses the key findings from the Authority's and the courts' earlier jurisprudence. These criteria, containing the key principles of the Authority's and the court's established law enforcement practice, can provide guidance for content providers when rating programmes.

i. General Provisions

At the outset, the Recommendation sets out the purpose of classification, then it provides justification for it; next, it provides guidance for the actual classification. Under the Recommendation, the aim of the programme classification is to protect children against programmes that can endanger the development of a personality responsible for itself and suitable for existence in society. All programmes supporting patterns of conduct, beliefs, or values that contradict the norms generally accepted by society, in particular with the fundamental Constitutional values, can be classified as potential harm. The Media Act specifies a few problematic content elements, ie, violence, conflicts resolved with violence and sexuality, through which the programme can have a negative effect on the healthy development of minors. This statutory listing however fails to include all possible harms, but specifies those seen as most significant. When assessing the possible negative

203 Decision No 741/2011 (VI. 01.) of the MC.

204 See, Resolution No 1494/2002. (X. 17.) of the ORTT (the so-called classification position).

impacts, primarily the prevailing public opinion and the values and objectives preferred and set by the various institutions of society (healthcare, education, etc.) should be taken into account. The Authority stresses, furthermore, that the protection of minors does not mean that certain topics are treated as taboo, but the entire context and message must be assessed in view of the intellectual and processing abilities of minors in connection with age phases.

As a justification for the special protection of minors, the Recommendation cites a Supreme Court decision made under the scope of the RTBA, according to which 'the realistic value-judgment of the recipient may not be assumed, ie, it may not be assumed that minors will analyse and assess what they see on the basis of an appropriate scale of values, since minors are in the process of the formation of such a final scale of values. This is what renders their personality development vulnerable, and this forms the grounds for their special protection.'[205] The Recommendation underlines that, due to the special protection for minors, content providers are always required to proceed restrictively rather than permissively during classification. When assessing the harmful effects, the interests of the child take primacy. In accordance with the justification given in the Recommendation, the Authority cited in many of its decisions the first instance judgment made by the Metropolitan Court in 2005, when it declared that 'the healthy moral, intellectual, and psychological development of minors is a constitutional value, to which all other constitutional freedoms must give way. The freedom of expression, editing and broadcasting can apply only subject to taking the maximum protection of this value into account. In the event of doubt, only overprotection can be the acceptable benchmark.'[206]

Under the guidance given in the Recommendation, it is to be examined in the classification whether individual programmes contain any harmful effects in terms of minors' physical, psychological, or moral development. In this case, the so-called 'topic expansion test'[207] must be applied: it is to be examined whether any harm appears in the programme, and with what weight and manner it is presented.[208] The topic and presentation of the media content must be comprehensible for the relevant age group, and they must be able to follow it. It should also be examined whether the given programme contains any elements that help children within the protected age group to distance themselves from what they see, and to decode and re-assess the violence, sexuality, or other harmful content presented. Furthermore, the imagery, the music, and the other sound effects that may reinforce or mitigate the effects of the dramaturgic events also have to be taken into account. In terms of the message conveyed, classification can depend on whether the programme flow presents the critical content as an attractive example or an example to be condemned.

The courts highlighted several times in their judgments that, for the purposes of age rating classification, it is always the total impression of the programme that must be considered.[209]

205 Supreme Court judgment Kfv. III 37507/2001/5.

206 Budapest Metropolitan Court judgment 3.K.33902/2005/7.

207 S Kóczián, 'Gyermekvédelem a médiajogban' (2014), http://mtmi.hu/dokumentum/633/koczian_sandor_gyermekvedelem_mediajog.pdf.

208 The courts declared in several cases that 'as a first step in the classification, the content of the programme must be examined. If it turns out that it contains a problematic issue for the vulnerable age group, it must be examined in what context the infringing content appears, how accentuated it is within the programme and whether the programme contains any means for minors to distance themselves' (Budapest Metropolitan Court judgment 24.K.33229/2005/6.).

209 Budapest Court of Appeal judgments 2.Kf.27.065/2004/3. and 2.Kf.27.074/2004/3. 'When setting age rating correctly, the total effect of the programme on minors must be taken into account, ie, it must be analysed uniformly, looking at the entire movie, not only its wording, but also its visual depiction, background sound and music, its content merit—to have appropriate consideration aspects for making the decision.'

In view of this, the Recommendation cites one of the judgments made by the Budapest Court of Appeal, according to which the 'categorisation of programmes, as a whole, depends on the number, length of the scenes giving rise to the protection of children and minors, their quality, dialogue, visual depiction, background music, content merit, and their understanding with or without explanation, ie, their total effect on minors.'[210]

The Recommendation provides practical guidance for the instance when a single element or scene of the programme flow contains any of the criteria applicable for a higher rating. Namely, in such a case, rating into the higher category must apply, ie, when individual elements or scenes belong to a higher category, it affects the classification of the entire programme.[211] Whereas, in the case of programmes which consist of segregated parts, the more severe classification of a single segment may result in the more severe classification of the entire programme. The individual episodes of series must be classified separately, as practice shows that there may be marked differences between the individual parts in respect of aggression, fear, or sexuality.[212]

In connection with classification, the Recommendation draws the attention of media service providers to the conclusion drawn from the practice of the Authority and courts, ie, that they cannot escape the establishment of an infringement by relying on the classification by the National Film Office on the basis of the Act II of 2004 on Motion Pictures, or another international classification. This warning means, on the one hand, that in view of the significant differences between the values and social, cultural, and moral perceptions of individual countries, a classification applied in another country cannot be taken over automatically; the classification must be carried out by the media service provider for each programme, on the basis of the MA. On the other hand, the classification given by the National Film Office, engaged in the age rating classification of motion pictures and DVD and/or Blu-ray publications, is irrelevant in legal terms for television broadcasting.[213] The jurisprudence explains the justification for these two types of classification with the different mode of action of the movie and television, since 'the television genre is of a completely different nature, both in terms of its effect and its viewing figures.'[214]

ii. Rules on Individual Age Rating Categories

The Recommendation uses the building block approach when describing individual age group categories, thus it takes the category under examination and the one level higher category into account when describing the content presented, and the form of presentation suitable for a given age, and the recommended mode of presentation and context of topics for that age. The approach applied by the Recommendation takes off from the basic assumption that, at the start of the classification process, the media service provider already has a notion of what age-group is targeted by the media content to be classified. Starting from the premise, the

210 Budapest Court of Appeal judgments 2.Kf.27.164/2005/5. and 2.Kf.27.250/2006/6.

211 Budapest Court of Appeal judgment 2.Kf.27.154/2004/6.

212 Budapest Metropolitan Court judgment 2.K.31840/2004/4.; Budapest Court of Appeal judgment 4.Kf.27.362/2011/3.

213 Kóczián, 'Gyermekvédelem' (n 201).

214 Budapest Court of Appeal judgments 4.Kf.27.606/2006/3. and 4.Kf.27.179/2007/4.

corresponding age rating category classification criteria must be mapped. Where an element implying the potential for harm occurs in the programme justifying a higher age rating classification, the programme must be classified into the higher category.

The above-mentioned provision of the Recommendation is in line with the rule developed by the jurisprudence, ie, a programme that cannot be understood or can be misunderstood by a minor, even with an explanation from an adult (because, due to their age, they are not developed enough for its reception) must be classified into a higher age rating-category.[215] Increased attention must be paid to the age of the minor during the rating and broadcasting of programmes, since the same programme can have a different effect on a six year old and on a twelve or sixteen year old viewer.[216] For example, in the court's view, airing programmes during the day can be accepted only if there are no harmful elements at all present in them, or where the problematic parts can be understood by the under 12 age group with the assistance of a parent, and 12–16 year olds are capable of understanding it on their own.[217]

The Recommendation lists the mental characteristics and media comprehension competencies of the age-groups under the various age-rating categories, then presents a non-comprehensive outline of what elements may appear in the given category and what elements call for a higher category in respect of the individual issues (eg, genres, groups of harmful elements, etc.).

Below I present the key provisions of the Recommendation per age rating category, together with the relevant case law. In this context, it is worth noting that, in general, the Authority considers a breach of classification provisions as grave infringement, in view of the priority protection of minors that can be derived from the FL and the MA. Under the general rules, the Authority selects the legal sanction, on the basis of general rules (Article 185–187), by applying a margin of discretion alongside the characteristics of the individual case, which, in its view, is proportionate to the infringement, and sufficiently dissuasive to prevent further infringements. On the basis of progressivity, the legal sanction becomes graver with the repetition of the infringement. The legal sanction depends on the nature, gravity, and repetitivity of the infringement, and the number of people who actually suffered or were at risk of suffering harm to their interests. With regard to this latter consideration criterion, the Authority takes into account viewing figures when imposing a legal sanction, thus it applies a more severe sanction when the programme at issue was followed by a great number of minors who actually suffered or were at risk of suffering harm to their interests. In this regard, it is an aggravating factor where the media service provider is considered as having significant market power.[218]

Subsections on individual age rating categories are divided into three parts:

(i) the first unit describes the media comprehension competence of the affected minors;
(ii) the second unit is on the characteristics of the programmes to be classified in the relevant age rating category;
(iii) the third unit deals with the harmful content elements mentioned by the Recommendation within the relevant age rating category and the problematic genres.

215 Budapest Court of Appeal judgments 2.Kf.27.147/2010/4. and 2.Kf.27.514/2010/9.

216 Budapest Court of Appeal judgment 2.Kf.27.250/2006/6.

217 Budapest Court of Appeal judgment 4.f.27.082/2005/10.

218 Pursuant to Article 69(1) of the MA, linear audiovisual media service providers and linear radio media service providers with an average annual audience share of at least fifteen percent shall qualify as media service providers with significant market power, provided that the average annual audience share of at least one of their media services reaches three percent.

a. Programmes which may be viewed by persons of any age: Category I

Programmes to be Classified as Category I

On the one hand, the Authority recommends Category I for programmes expressly produced for kindergarten age children, therefore they are comprehensible for them (eg, *Winnie the Pooh*, *Pumuckl*, *The Smurfs*, *Thomas the Tank Engine*, *Dora the Explorer*, etc.). The Recommendation highlights that both the topic and the manner of adaptation have to fit in with the age characteristics of children below six years of age, considering that understanding television programmes is active intellectual work for young children. Therefore, in order to maintain attention, only elements can be used that do not overwhelm the children, do not tire out their processing capability prematurely, ie, less noise, a slower pace, child oriented language, and a series of formal elements are required that place processibility, thinking and comprehension into the foreground. Dark, blurred scenes, quick cuts or loud, threatening background noises, and aggressive, threatening background music must be expressly avoided, because these scare smaller children or make them excited.

In a related case, in the Authority's view, the television station subject to the procedure incorrectly classified certain programmes, made expressly for children in Category I, and was given a warning over this.[219] According to the Authority, animated films that draw attention to the dangers of the Internet (eg, chat, problematic content, misuses, etc.) should have been classified to the higher Category II, since, despite the images characteristic of tales (wise shepherd, silly servant), children under six are unable to understand the message conveyed by the programme. These films can trigger disturbed and unresolved frustration, therefore, they are recommended for viewing by an older age group. Another preventive short film challenged by the Authority in the same decision, on school theft, is targeted expressly to the above six age group, therefore a kindergarten age child is unable to understand the message of the programme, the importance of precautionary measures.

On the other hand, the Authority considers programmes classifiable into Category I that are not expressly produced for children but do not contain harmful elements, and which children under six are not able to process appropriately. These are, eg, traditional quiz games, travel programmes, environmental protection magazines, and cooking programmes.

In a related case the Authority imposed a 300,000 forint fine on a broadcaster which classified its criminal magazine into Category I rather than to Category IV.[220] (On the grounds of airing the previews for this magazine programme, the Authority imposed a further 100,000 forint fine.) The programme challenged by the Authority details actual crimes with the assistance of the invited experts. Films presented by extras illustrated the crimes, then the presumed perpetrator and the defence lawyers of the convicted presented the publicly accessible details of criminal cases. Amongst others, the topics of the programme concerned growing marijuana, a paedophile teacher and misuse of banned pornographic images, homicides, and armed robbery. The presentation of illustrations depicting minors in connection with the paedophile case was a particularly concerning element of the programme, furthermore there was a scene when the defence lawyer of the paedophile teacher (with the

219 Decision No 925/2013 (V. 29.) of the MC.
220 Decision No 1548/2012 (VIII. 29.) of the MC.

support of the presenter) questioned the authenticity of the underage victims giving testimony against the teacher, calling it a child's antics.

In another, similar related case,[221] the Authority sanctioned a television station by imposing a 620,000 forint fine, because it aired without an age rating, ie, as a Category I programme, its programmes on preventing and curing cancer, which correctly should have been classified and aired as Category III. (Since the media service provider failed to make a statement in the proceedings of the Authority, it is therefore unknown whether the age rating was left out from the programme due to negligence or intentionally—in any case, the media service provider is subject to objective liability for the content its broadcasts). In the challenged programmes, content was aired on numerous occasions that could not be understood by the members of the under 12 age group and that could trigger fear and irrational anxiety in them. In these programmes, the idea of death and loss was in the foreground, and, during the conversations, patients and their relatives often talked quaveringly about their condition, symptoms, and fears. Certain conversations and letters read out loud were specifically burdensome, even to the adult age group, in emotional terms. Detailed presentation of the side effects and lack of success of medical and radiation therapy applied in the curing of cancer was one of the elements of the programme examined and found harmful for the age group to be protected and, in this context, there were references to the drug mafia and its satellites in an aggressive communication style, which could even negatively influence the children's perceptions of security and conveyed a negative behavioural pattern. The challenged programmes furthermore offered a one-sided and misleading lifestyle to discourage taking prescribed medication, and to be wary of medical professionals.

Harmful Elements Mentioned in the Recommendation in Category I

(i) Negative Behaviour Pattern

Under the Recommendation, even cartoon characters are not allowed to display behaviour that is not to be copied by the child or, expressly against parental warnings, facilitate the fixation of vulgar and uncultured behaviour.[222] In the programmes non-abusive slang can be used, but no obscene wording or swearing can be present.

In a related case, the Authority challenged that a radio station subject to the procedure had classified its chat programme aired in the morning hours in Category I rather than in Category III, in which the presenters asked the listeners who had stolen and what in their life, and they had an in-house competition for the 'The most light-fingered listener' award.[223] Jointly with the listeners, they mentioned thefts from their childhood and adolescence, but hotel and restaurant theft was also mentioned as a completely natural activity. The intonation of the segment was humorous, but child-age listeners still could have the impression that theft is a natural part of life and good fun, and conducted by everybody on many or a few occasions. In addition to the above, from the perspective of the protection of minors,

221 Decision No 161/2013 (I. 30.) of the MC. For example of a further similar case, see, decision No 1760/2013 (XII. 11.) of the MC.

222 See, as an example for challenging the verbal aggression used by the presenter as communication strategy, decision No 2213/2012 (XII. 12.) of the MC.

223 Decision No 397/2014 (VI. 29.) of the MC.

what is the most reprehensible is that nobody in the programme mentioned the criminal law consequences of theft; moreover, that theft is to be condemned in any case, irrespective of the value stolen. It is worrisome that presenters known from the television, who can also serve as a model for espousal for minors with no established values, also shared their own stories on theft. Minors could be disturbed by the presenters understating the crimes they committed, and they made permissive statements about them.

Finally, the radio got away the procedure with a warning, since the presenters showed active regret, during which they informed the listeners of the pending procedure by the Authority; they acknowledged that they had been wrong, and stressed that theft is an act to be condemned rather than a joke, and this crime cannot be mentioned with tolerance, even when it was committed in childhood. The presenters also expressed their regret that they, as well as known media personalities and models for many, had made inappropriate statements on this issue. In addition, the media service provider had a live interview with a lawyer who explained the forms of theft and their criminal law sanctions.

(ii) Depicting Violence

According to a generally accepted view in the literature, before the age of 6 a child is not able to distinguish between fiction and reality at all. Therefore, the depiction of violence requires a particularly careful treatment; in this category, no realistic depiction of violence can be present, since for them the content shown by actual characters looks very realistic to them. Depiction of aggressive behaviour can only occur when it is obviously fictitious and when it is fully justified for the line of action or the topic. In the classification, it must be taken into account that children of this age strongly identify themselves with the characters, therefore they experience similar emotions to the characters; if a character is scared, a child will be scared and suffer if the character suffers. The transmission is particularly direct in threatening situations, thus violence, chasing, and conflicts in emotional relationships trigger fear in them, and they are unable to suppress it on their own.

In one of the related cases, the characters in the programme challenged by the Authority were dogs and cats with human characteristics, actors wearing masks.[224] The topic of the series with live characters was arranged around law enforcement. Szimat Szörény is a determined detective from Dogland Yard who investigates a case at any price and finds the perpetrators. In the world of dogs and cats, violence, hostility, and harming others (theft, terrorist attacks, and kidnapping) are not much different from real life law enforcement practice. Szörény and his partner, Captain Doberman, have been in dangerous situations on numerous occasions because they need to use violence themselves against those breaching the law. In the analysed programme, adult issues appear—kidnapping, crime, and violence—posing a source of danger to minors, therefore their occurrence in children's programmes is not allowed. This programme—primarily due to the pictures creating fear and depicting aggression—was not compliant with the criteria for age rating Category I; this programme should have been classified into age rating Category II, both on the basis of its content and the adaptation features.

Another case gives an example that even violence shown in a humorous way can be the subject of a programme to be broadcast.[225] The media service provider, sanctioned by a 100,000 forint

224 Decision No 677/2013 (VI. 17.) of the MC.
225 Decision No 174/2015 (II. 24.) of the MC.

fine, classified and published its magazine programme challenged by the Authority into age rating Category I. In this magazine programme, the following fake news was presented by a comedian: 'Approximately two hundred women have been waiting in the vicinity of the ELTE Law School, hoping they will be raped'. The comedian poured scorn on lonely women when referring to an actual case that had recently come to light—the sexual violence that took place at the ELTE pre-university camp. The character made fun of a serious crime, belittling not only the action cited in the fake news but also the phenomenon itself (sexual abuse), and the trauma the victims experienced. According to the Authority's view, the intended humorous adaptation of this topic did not help; instead, it made it more difficult for the vulnerable age group to process this serious social issue at the appropriate level. Adolescents could identify themselves with the famous comedian; as such, his attitude towards relationships (shown in the programme) could serve as a negative model; the words expressed were capable of influencing negatively the personality development of the protected age group. In the Authority's view, presenting the issue of sexual crime as a humorous topic can have a harmful effect on the development of viewers under 16, therefore it could have been broadcast as classified into Category IV, only after 9 pm.

(iii) Fearmongering
Issues that can compromise the feeling of security for children below six years of age must be handled with special care (eg, family conflicts, death of parents or close relatives, abandonment of a child, injury or death of animals) since the ability of a child to interpret what they see as fiction develops only at a later stage.

In a related decision, the Authority challenged the classification of the animated adaptation of *Képtelen természetrajz* into Category I. This animated movie presents animal species with humour as a caricature; however, children under the age of six are not capable of understanding this ironic language, and the details of hunting animals can trigger fear in them, since they project it to reality.[226]

(iv) Sexuality
Gestures expressing affection, such as a kiss or walking hand in hand, can be accepted if they are not presented as an end in themselves, not in too much detail or appear in a context comprehensible for smaller children, and their purpose is clearly to depict togetherness and solidarity (eg, between the parent couple or the parent and child). The issue of pregnancy or birth (arrival of a little brother or sister) is not a taboo in itself, but due to the limited biological knowledge of children under six, in this regard it is recommended to depict it verbally, without presenting the process of delivery.

b. Programmes Not Recommended for Audiences under the Age of Six: Category II

The Authority recommends classifying programmes into Category II that

(i) are expressly produced for six to twelve-year-old children, therefore, they are comprehensible by them (eg, feature length cartoons produced for children, such as *Little Mermaid*, *Lion King*, and *Hunchback of the Notre Dame*, and family movies such as *Beethoven* and *Lassie Come Home*);

226 Decision No 925/2013 (V. 29.) of the MC.

(ii) do not convey a behavioural pattern through which violence appears without criticism and/or the relevant age group is able to interpret it as fiction (eg, the so-called classic cartoons, *Tom and Jerry*, *Road Runner*, etc., since the burlesque-like violence in them is already treated as fiction by the six to twelve-year-old age group);
(iii) do not contain scenes that a child of six to twelve years of age is unable to comprehend and induce fear and aggressive moods (eg, nature films where animals show threatening behaviour, or the external presentation of a living creature is scary, or possible where a predatory lifestyle is depicted in a realistic manner).

Harmful Elements Mentioned in the Recommendation in Category II

(i) Negative behaviour pattern
Language appears to the relevant age group as a model, therefore the use of interjections expressing surprise or shock, or possible funny swear-words, non-obscene gestures, and hand postures can be accepted; however, aggressive language patterns must be avoided.

(ii) Depicting violence
Animated programmes intended for children between six to twelve years of age can contain non-realistic violence; however, the prevalence and the manner of depiction cannot be over-intense or drastic; furthermore, the visual effect cannot increase stress and anxiety. When deciding on the permissible aggression content of programmes, it is decisive how often the violence, or the stress caused by violence, is released and that the violent act and its negative consequence is understandable by the child. The lack or release of the cumulated stress from time to time leads to an increased anxiety level in the viewer and therefore the inclusion of a quiet period or possible the presence of humour is an important element in programmes intended for this age group. Although humour is one of the means to decrease the creation of the violent effect, which can help the child to recognise that aggression can have no tragic consequences, but it cannot give the impression that destructive, antisocial behavioural patterns are accepted; it cannot idealise violent conduct, and it cannot have the effect of triggering cynical crude emotions in children without any empathy towards the suffering of others. The images on the screen cannot induce copying dangerous acts and behaviour patterns or show them without depicting their consequences.

(iii) Fearmongering
So-called adult topics, such as crime, death, serious diseases, marital issues, etc. are still not recommended to the six to twelve-year-old age group. Topics recommended in various programmes are those directly related to the events end experiences of a child's world. In this age, family is perceived by a child as a place providing protection and they react very sensitively to any conflicts affecting the family such as the divorce of parents or family rows. In programmes classified in this way, topics that can threaten the child's sense of security must be treated with care, and a positive outcome is a must.

In one of the related cases the Authority upheld, subject to a total of 75,000 forint in fines, that the documentaries on the Holocaust and the theme of genocide classified and aired by the television station subject to the procedure as Category II contained several elements

that could be harmful for children.[227] Programmes depicted the suffering of victims mainly verbally; the story was illustrated the contemporary photos and archive recordings. The reports by the survivors were extremely harrowing. Stigmatising humans, killing another human, and condemning innocent people to death are all issues that can be problematic for a child under 12, and so the programmes should have been classified into age Category III.

(iv) Sexuality
Sex-related issues from the media that affect children too early can have extremely negative consequences on their psychosexual development. At the same time, puberty, the start of sexual maturity, shows a rather wide deviation and the older members of this group (10 to 12 year olds) can already be affected in certain cases. Since these individual differences cannot be taken fully into account by the age rating classification of programmes, in connection with informative images of sexual content and information, special care should be exercised to prevent problems for younger children, eg, it should not trigger disgust or fear in them.

c. Programmes Not Recommended for Audiences under the Age of Twelve: Category III

Programmes to Be Classified as Category III

The Authority recommends classifying programmes into Category III that were expressly produced for adolescent viewers (eg, *Heartbreak High*, *Beverly Hills 90210*), or not presenting harmful content to a degree that is not comprehensible by a child of 12 to 16 years of age, such as:

- westerns, adventure movies, costume dramas, historical dramas that took place in the past and are remote from the everyday world therefore pose no potential danger (eg, *Zorro*);
- disaster movies with exaggerated situations fairly remote from the reality and where the key characters survive (eg, *Twister*);
- fantasy and sci-fi that can be interpreted as fiction (eg, *Star Wars*), animated movies with realistic, naturalistic manner of depiction (eg, *Avatar*);
- soap operas, with less characteristic violent content, and where the depiction of sexual conduct and the verbal references to it are discreet;
- crime series, where the attractive detective hero applies only reactive and morally justifiable violence, the outcome is positive, and frightening images are not an end in themselves;
- tabloid programmes where the topics raised, their presentation and message conveyed have no harmful effect on the development of the 12 to 16 year old age group;
- talk shows, where the problematic conversations are handled with suitable sensitivity, and refrain from a direct depiction of violence and sexuality—either verbally or visually;
- reality shows and talent shows where sexual and violent contents do not appear directly, and the conveyed models and behavioural patterns are suitable for the adolescent age group.

227 Decision No 348/2013 (II. 27.) of the MC.

Harmful Elements Mentioned in the Recommendation in Category III

(i) Negative Behaviour Pattern

The media service provider must keep in mind that adolescence is of key importance in the child's development, since this time is when the child's world view and values are developed. Youth looks for ideals that can be a model to copy, and television heroes might raise an urge to be identical to them. It follows that programmes classified in this way cannot tempt identification with heroes characterised by antisocial, destructive, or violent forms of conduct, or who use illegal means to achieve their goals, and they cannot suggest double standards that can disturb the child's identity and cause moral uncertainty. It is important that any violence used by the main character can be justified morally, since the viewer identifies themself with that character. Young people choosing media stars as idols attribute special values to these characters, such as physical attractiveness, wealth, prosperity, and success. Adolescents can take over their value preferences, ideological views, lifestyle and success strategies, but in the meanwhile it can cause problems in the self-assessment and cause inferiority complexes. Research into health related behaviour has proved that nutrition, sexual activity, alcohol consumption, smoking, and use of drugs show a correlation with the role models appearing in the media.

With regard to alcohol consumption, according to the conclusion of the Court made in one of the related cases, alcohol can appear in the programme without emphasis and with its consumption, in a usual adolescent party situation, embedded in the programme in a dramaturgically justified manner, and a presentation of this kind is not a model that encourages adolescents' alcohol consumption.[228] In the same case, the Court established during the review of the Authority's decision, contrary to the Authority, that the scenes suggesting the use of drugs in the programme, as challenged by the Authority, were not as an end in themselves but of an awareness raising nature, drawing attention to the dangers and consequences of drug abuse, by clearly condemning it and describing its harmful consequences. In the programme, the scenes aired in connection with the use of drugs contained no model or value for the under 16 age group that could have influenced their physical, intellectual, or moral development and thus giving rise to classification in the higher Category IV.

For programmes mainly built on verbal communication, such as afternoon talk shows, due to the high reality relevance arising from the specific genre characteristics, discussing adult topics can be allowed within this age rating category if they are handled with suitable care and sensitivity when unfolding the topic. Amongst others, it is not acceptable when negatives, such as criminal law consequences or harmful health effects, or social and human consequences are not mentioned, or where antisocial behaviour is represented as desirable and socially accepted, or it is presented in overly detailed manner, which can serve as guidance or encourage copying. It is also important that options for resolving conflicts and deviancy are mentioned. Discriminatory content capable of reinforcing prejudice is also not desirable where it is not clearly and appropriately condemned or balanced. In the selection programmes

228 See Decision No 1369/2013. (VI. 4.) of the MC, and the first instance judgment made in its judicial review by the Budapest Administrative and Labour Court, 17.K.33.339/2013/19., and the approving second instance judgment by the Metropolitan Court, 3.Kf.650.038/2014/6. The Curia upheld the second instance judgment in its judgment No Kfv.III.37.155/2015/6. made in the extraordinary review procedure initiated by the Authority.

of talent shows where amateurs appear in front of a professional evaluation panel, making contestants appear ridiculous is also problematic where, as a result, the image is created that it is accepted to criticise the looks, differences, or different way of thinking of others, and to embarrass them by ignoring their possible disability or possibly strongly altered state of consciousness.

With regard to vulgar and strong language, it is not allowed in this age group to have multiple humiliating phrases, to mention genitalia or swear using sexual connotations. In one of the related cases, the Authority ordered the broadcaster that classified and published the comedy film *Csak szex és más semmi* in Category III, for the infringement of the statutory provisions on age rating categorisation and broadcasting, to pay a 5 million forint fine, and for the infringement of the statutory provisions on publishing previews, a further 1.5 million forint.[229] According to the Authority's view, this film does not process the topics of choosing a partner, sexual, and emotional life, the relationship between a man and woman, taking up a child, founding a family and commitment (issues that adolescents are also concerned with) in accordance with the level of intellect and emotions of the under 16 age group. In the programme, numerous negative patterns appear and vulgar, obscene, and sexual connotations can be found in the dialogue. This motion picture contains negative clichés for gender roles, which are suitable for identification, eg, the main character intends to use men as tools for producing the desired child; the main character's female friend appears in a subordinated role in her relationships; and a male character, depicted as a lovable and rough man, uses only derogatory, obscene, vulgar language against women, mainly treating them as sexual objects. In the motion picture, sexuality appears in two different contexts; on the one hand, as a form of instinctive satisfaction, and on the other hand, as a necessary adjunct to becoming pregnant. At the same time, sexual intercourse in a committed relationship, desirable in social terms, is not presented.

The Authority classified this film as critical on the grounds of the attempted suicide depicted in the film, due to adolescents' desire to copy models, which is reinforced by the effect facilitating identification with media actors. The Authority explained that, during adolescence, the prevalence of suicide is increased, and suicides that took place are mainly likely to be copied by the adolescent age group. Although the motion picture does not go into detail regarding the suicide attempt, the character's farewell message is mentioned, and also the packaging of the drug can be seen, so the method of suicide is clear and could be copied by the viewer. In the review initiated by the television company, both the first instance and the second instance court[230] agreed with the Authority's substantive findings (the court of second instance only reduced the fine, in view of the fact that at the time when the infringement took place, that television was not a dominant broadcaster, and only a lower fine could have been imposed against it).

In another related case, the Authority imposed a total of 9 million forint fines on a national commercial television channel because it infringed the relevant provisions of the media law by classifying one of the episodes (and previews) of its talent show as Category III, and its

229 Decision No 739/2012 (IV.18.) of the MC.

230 See, Metropolitan Court of Budapest judgments 26.K.31.75812012/7. as court of first instance, and 3.Kf.650.153/2013/3. as court of second instance.

broadcasting as such.[231] The Authority upheld that the rap song played in the challenged part of the programme flow contains vulgar terms in a sexual context, the entire song builds on misogynistic remarks, and calls women in general whores, discusses them in a humiliating manner, and, despite the frequent application of beeps, the topic of the lyrics and the continuous use of obscene words was obvious. In the Authority's view, in this case, muting could be only a partial solution to the problem of bad language; the lyrics with the frequent beeps kept conveying the message towards the age group to be protected that swearing and using obscene words is part of trendy behaviour. The Authority also challenged that the panel's unanimous evaluation leading to the contestant's qualification could reinforce in minors that the presentation of an act with frequent obscene words that treat women in general as whores is a sign of talent leading to national popularity. The Authority assessed the fact that the programme reached record viewing rates (it was the most viewed programme of that year so far) as an aggravating circumstance.

Upon the request from the television channel, the court reviewing the Authority's decision considered, by agreeing with the Authority, that the harmful message of the programme was the continuous swearing, and the muting was not perfect in every instance. Since rap songs build on rhymes, despite the muting, the rude phrases could have been found out. In the court's view, at the same time, the evaluation by the panel could not be included in the infringement, because the infringement itself was the rap song full of vulgar phrases. In the court's opinion, the Authority went too far in its conclusion that the act suggested that classifying women as whores can result in popularity. Despite these differences, the court confirmed the substance of the Authority's decision.[232]

(ii) Depicting Violence

Scenes containing violence must be low-key in terms of the frequency and the manner of depiction; violence can be depicted while keeping a distance. In one of the related cases, the Authority upheld, subject to imposing a total fine of 6 million forint, that the film classified into category III, *The Sleeping Dictionary* (2003, Guy Jenkin), aired by the national commercial television channel subject to the procedure (in addition to other harmful content) depicts violence in a manner and to an extent requiring a higher age rating classification.[233] According to the statement made by the media service provider in the Authority's procedure, there is no rough violence or aggression in the scenes challenged by the Authority and, thanks to quick cuts, the motion picture is not more aggressive than any Bud Spencer film. The Authority upheld, despite the statement by the television channel that the challenged series of scenes, battle scenes and physical violence scenes affecting the main characters present violent and naturalistically depicted images, bloody injuries and corpses, convulsing injured and agony are not acceptable for a programme recommended for children below twelve years of age.

In the first instance of the review procedure initiated by the television channel, it was unsuccessful in arguing that it classified this motion picture in accordance with the age rating classification by the German and Australian authorities. The court of first instance, by

231 Decision No 1326/2012 (VI. 18.) of the MC.

232 Budapest Administrative and Labour Court judgment No 6.K.29.115/2013/2.

233 Decision No 802/2014 (VI. 2.) of the MC.

agreeing with the Authority, considered, by reference to earlier jurisprudence,[234] the values followed by the classification abroad as irrelevant for the classification. In its final judgment dismissing the action by the television channel,[235] the Court explained that there might be parallel content between certain scenes from the films referred to by the television channel as containing violence, offensive, and bloody scenes or battle scenes (eg, *The Patriot*, *Tom and Jerry*, *Red Riding Hood*) and *The Sleeping Dictionary*; however, the total effect resulting from the visual depiction and the direction, dramaturgy, and the tools of enhancement are significantly different, and, in terms of its total effect, the scenes of this motion picture challenged by the Authority make the finding of the infringement well-founded.

The media service provider submitted an appeal against the first instance judgment, and the court of second instance, after having watched the programme and contrary to the Authority and the court of first instance, found the provisions on the infringement unfounded.[236] According to the court of second instance, the programme showed low-key violence, as an integral part of storytelling; violence and a conflict resolved by violence was not a decisive element in the motion picture. In the battle scene, there was no offensive and close-up butchering shown; sound effects and falling bodies were not decisive parts of the scene that the 12–16 year age group would not be capable of processing. The court of second instance changed the Authority's decision, and set aside the infringement and its legal sanctions.

(iii) Fearmongering

At this age, children can put up with a higher level of excitement such as that caused by, eg, science-fiction, fantasy, or disaster movies, because the sense of threat and fear plays a less important role for the above 12 age group. They are no longer scared by directly recognisable threats; they are able to deal with the accumulated stress in a more distance-keeping manner if there are enough signs suggesting that it is not real. From the perspective of fear mongering, works can be problematic if their dramaturgic devices and everyday world reflects a realistic depiction, the life situation presented can be linked to everyday situations, and their relevance to reality is high. For the 12–16 year age group, works with particularly scary scenes must be avoided, where extremely scared characters have a key role, or where the tragic depiction of the victim's suffering is detailed or possibly the continuous feeling of being under threat, created by visual and sound effects, is not resolved until the end of the movie.

In one of the related cases (in addition to establishing other infringements and sanctions) the Authority upheld, subject to imposing a 10 million forint fine, that a segment of a morning show, classified into category III, aired by the countrywide commercial television channel subject to the procedure, can trigger anxiety and fear in the vulnerable adolescent age group to be protected to an extent that would have required a higher age rating classification.[237] The topic of the segment challenged by the Authority was a child homicide that shocked the entire country. The presenter of the magazine, after a compilation where

234 Metropolitan Court judgment 3 .K.31.308/2006/2.; Budapest Court of Appeal judgment 2.Kf.27.419/2010/9.

235 Budapest Administrative and Labour Court judgment No 26.K.34.038/2014/3.

236 Metropolitan Court judgment No 3.Kf.650.024/2015/6.

237 Decision No 169/2013 (I. 30.) of the MC.

the mother of the murdered child also spoke, discussed the subject of prison hierarchies and the supposed state of mind of the murderer with an invited criminologist, then asked a child protection expert about the victim's family background and the difficulties of placing children with different families.

In the Authority's view, the challenged programme segments raised a very sensitive issue and numerous unresolved circumstances. Confusion and fear could be triggered in the family related sense of security of a minor viewer by, in addition to the person of the assumed perpetrator / instigator, also the unbalanced family background of the murdered boy—the mother could not bring up her son due to her financial difficulties; he was entrusted to the grandmother, then, due to the grandmother's illness was placed with the former husband of the mother as foster-father. Later, the foster father started a relationship with a women, but their relationship was not undisturbed, as it turned out from the reportage, and the girlfriend, a cohabitating partner for a while, indicated the minor victim as a reason for the problems.

A further anxiety could be triggered in children that further reportages suggested that the impaired relationship between the adults could have led to the death of the boy. It turned out from the studio interviews that the foster father had been separated for two years from the assumed perpetrator / instigator, but even the expert was unable to reply how this relationship could have persisted in this way, since the competent authorities regularly visit and monitor families of this type, and they intervene if they detect any problems. Furthermore, in connection with the personality of the woman presumed to have carried out the homicide, it was told that she was a very good mother, and she loved the boy as if he was her own. For a minor viewer, this unclear and blurred information is difficult to process. Although both the news and the magazine programme classified the published compilations as capable of disturbing calm, due to the verbally detailed presentation of the topic, full of adjectives triggering strong emotions ('brutally murdered, then they dug', 'brutally killed', 'to make away with Bence') fear reactions might have been more intense and persisted longer in children. The Authority upheld that the inappropriate presentation of deviant behavioural patterns appearing in connection with the crime, the extreme resolution of conflicts and aggressive acts without due care, and the verbal detailing would have justified the classification of the programme into a higher age rating category, into IV.

In the court procedure initiated by the television channel for the review of the Authority's decision, the court of first instance changed the Authority's decision (amongst others) by upholding that the television had not breached the rules applicable to the age rating and publication of programmes, therefore it deleted the fine imposed.[238] After having viewed the programme at stake, the court took the position that the media service provider correctly classified the programme into Category III. The court stressed that in the challenged programme a professional discussion could be heard, expressly free from tabloid features, based on the actual case, but remaining at the level of generality. After describing the basic information, the programme dealt with the social and criminal law and psychological effects of the crime, with the involvement of experts, in an easily understandable manner.

The deficiencies criticised by the Authority, such as the high level of relevance to reality and the inappropriate presentation of deviant behaviour are absurd expectations that makes

238 See, Budapest Administrative and Labour Court judgment 24.K.30.776/2013/9, confirmed by Metropolitan Court judgment 1.Kf.650.287/2013/4. that acted in the second instance.

sense in genres of fiction. The Court agreed with the applicant that the programme's capability of triggering fear and lack of understanding is an element belonging to Category III rather than Category IV. It does not necessarily follow from the fact of fear that it has a negative effect on the physical, intellectual, or moral development of those under 16 years of age. The Authority did not provide an explanation of why and how the fear triggered by the challenged programme is capable of negatively influencing the physical, intellectual, or moral development of children under 16, which is an indispensable factual element of classification into Category IV. The Authority failed to clarify why it held the information in the programme to be unclear and difficult to process. The court declared the Authority's findings that a reassuring end to the conversations was lacking, and the conversations with the expert lacked resolution were directly contrary to the file, since the criminology expert expressly mentioned how the case could be processed in the family, by emphasising the importance of talking about what happened, and that the attention of the children must be drawn to the fact that it is not a frequent case, and an explanation must be given for the events. In addition, the expert also mentioned the role of information, and during the conversation the legal sanction, the punishment for the act and its enforcement was presented.

These solutions were precisely the methods of family and social processing of this tragedy, the lack of which the Authority criticised. According to the court, the phrases cited by the Authority from the programme indeed had not provided a basis for classification into Category IV since they had not exceeded the emotional level of phrases used in news programmes, and it would not make sense that three such phrases were capable of negatively influencing the physical, intellectual, or moral development of the children under 16, since this age group is not only exposed to more ostentatious phrases than these but also uses them on a daily basis.

(iv) Sexuality

With regard to the permissible sexual content of programmes, the media service provider must keep in mind that the approach of adolescents towards sexuality is still characterised by numerous contradictory ideas, frustration, insecurity, and lack of experience. The stance towards sexuality is often linked to anxiety and negative attitudes. They are not prepared to interpret and handle their stress created by the direct or rough appearance of sexuality in every case; as such, the direct depiction of sexuality, either visually or verbally, is not recommended for this age group. In addition to this, the period of adolescence is characterised by the search for role models that facilitate the learning of sexual roles, and the media can become an important source for this. Therefore, amongst other issues, programmes must be particularly avoided that make negative clichés concerning gender roles, or convey distorted behavioural patterns, fail to advocate equality in relationships, and that show relationships created for sexual purposes without emotions and promiscuity as accepted by society. The Authority considers particularly problematic for this age group the practice appearing mainly in tabloid programmes that make naked modelling and striptease seem easy ways of making money and the possibility of bright future, and withholding the possible dangers of this lifestyle.

The case mentioned above, that of the *Sleeping Dictionary*, in connection with the depiction of violence, also concerns sexuality. In addition to scenes containing strong and repeated violence, the classification of the film into a higher category was justified, according to the Authority's view, by the depiction of sexual intercourse, during which numerous details of the intercourse could be heard and seen. In one of the disputed scenes, eg, the main male characters kissed

the naked body of the female main character several times, during which the female breasts were depicted with more emphasis than was justified, then, after the foreplay, the intercourse was shown in a lengthy way, to increase anxiety. In the Authority's view, the presented content exceeds the level still acceptable for the age group to be protected, although direct depiction of sexuality, either visually or verbally, is not recommended to the adolescent age group.

The Authority furthermore found the love triangle presented to be problematic, and the presentation of the situation of women coerced into prostitution, which is expressly embarrassing and difficult to interpret for the adolescent age group. In one of the scenes of the motion picture it becomes clear that the female main character born in a marriage, and the female main character born out of a marriage are sisters, and their father the British governor of the colony, forces the main male character, to whom the illegitimate daughter, Selima, was earlier offered as a mistress to become engaged to his legitimate daughter. By the end of the film, the two sisters have given birth to a child for the same man. Ambivalent and volatile emotions characterise adolescents, therefore the presentation of family relations in this manner can confuse the members of the age group to be protected; they can remain on their own in resolving the stress. Selima and most of the female members of the clan satisfy the sexual needs of the British governors, thus it can convey the impression that women can be degraded to a tool and can be exploited. The Authority highlighted that, in programmes recommended for the adolescent age group, programmes that make negative clichés concerning the roles of sexes, or convey distorted behavioural patterns, fail to advocate equality in relationships, and that show relationships created for sexual purposes without emotions and promiscuity as accepted by society must be particularly avoided.

The court of first instance that acted during the review was not convinced of the television channel's statement on the romantic mood of the movie, furthermore it found the applicant's reference to the number of children born outside of a marriage in Hungary to be irrelevant, therefore the court shared the Authority's findings made in the decision in the context of the depiction of sexuality.

However, the court of second instance that acted on the basis of the appeal filed by the media service provider, after having watched the film, took a different view, ie, that the depiction of sexual intercourse was low-key, without any exaggerated naturalistic or distasteful presentation, and showed the intercourse as the peak of love in the equal relationship between two socially unequal parties; furthermore the presented situation cannot be interpreted as coercion into prostitution. The presentation of the female breast and the intercourse is not concentrated, these scenes emphasize the joy of finding in each other on the basis of a tender, playful, and mutual love, then discovering the joy of being together. There are obvious emotions in the background of this sexual intercourse, aimed at making each other happy, and it does not show a tangible act.

d. Programmes Not Recommended for Audiences under the Age of Sixteen: Category IV

In its Recommendation the Authority gives the following examples of programmes classified into Category IV:

– fictional action movies, crime movies and thrillers, and horror movies without the direct naturalistic details of the aggression's consequences;

- animes for an older age group, also depicting cold-blooded violence (eg, *Inuyasha*);
- crime series, in which in addition to a lengthy scary atmosphere, drastic and melodramatic homicides, or post-mortem examination scenes appear, positive heroes (policeman, forensic doctors) make sarcastic statements on the dead, private justice is shown in a positive light, or crimes are directly related to the world of children (eg, *Crossing Jordan*, *CSI*, *Medium*);
- historical and war dramas with extreme violence (eg, *Gladiator*, *Stalingrad*);
- teen comedies on the attempts of young people to gain sexual experience (eg, *American Pie*), or series where the depiction of sexual relationships is hand in hand with bad language, setting inappropriate role models, and non-conventional attitudes (eg, *Sex and the City*).

Harmful Elements Mentioned in the Recommendation in Category IV

(i) Negative Behaviour Patterns

The Authority warns media service providers to take special care in the area of value orientations such as the consumption of drugs, political radicalism, or xenophobia, mainly for motion pictures with a more complex dramaturgy, where morally positive and negative characters are not separated, the moral message is conveyed less directly, and those displaying attractive subcultures in a current environment. The work as a whole cannot support discriminatory attitudes or conduct against a person, sex, ethnic, religious, or any other group.

In connection with the direct visual depiction of drug abuse, the presentation of guiding details is not recommended for the 16–18 year age group, where the dangers associated with drug use are treated with lenience, or possibly advocate or encourage drug use. A similar procedure is required for media content where the use of easily accessible drugs, such as alcohol, tranquillisers or solvents, is depicted without criticism or in positive light.

With regard to strong language, the Authority does not consider the particularly aggressive use of swear words related to genitalia and sexual intercourse to be acceptable. In one of the related cases, the Authority imposed a 50,000 forint fine on a public service radio station, since it infringed the statutory provisions on the age rating category classification and broadcasting of a programme.[239] In the Authority's view, the radio drama subject to the examination should have classified into Category V due to strong language (and other harmful content), and to broadcast it with the relevant classification and at a time corresponding to it rather than in Category IV. With regard to bad language, the Authority challenged that the programme used strong language in connection with genitalia and sexual intercourse in a particularly aggressive manner.

(ii) Depicting Violence

In this age rating-category, rather raw and naturalistic forms of violence in a near-reality context, the processing of which depends on the life experience of the recipient rather than theirs media experience, are not allowed. Special care is recommended for works that cite the everyday life situations of that age group, where they can see that issues can be possibly

239 Decision No 1648/2011 (XI. 16.) of the MC.

resolved by violence, or have too close links with their own reality, therefore, may trigger excessive fear. The detailed depiction of physical torture or body mutilation, or shockingly open and particularly brutal presentation of injuries is not recommended within this age rating category. Also, the presentation of violent acts carried out cold-bloodedly or in a particularly brutal manner, and sadistic scenes where the happiness or joy over the violence or the victim's suffering is emphasised. For reasons horror movies where characters are butchered using selected brutal ways and means, and the end of the movie bring no relief to the viewer, belong to a higher age rating-category. Presentation of the details of suicide or suicide attempts in this age rating-category can also be of concern due to the unstable emotional state of adolescents, and due to this, their increased vulnerability. Programmes praising violence or presenting it as an acceptable or desirable behaviour can also be harmful.

In a related case, the Authority imposed a total fine of 380,000 forint on a television media service provider, because it classified and published the film *Chocolate* (2008, Prachya Pinkaew) (and its previews) into age rating category IV, ie, 'not recommended for audiences under the age of sixteen', although it should have been classified, due to the violent acts into Category V, 'not recommended for audiences under the age of eighteen'.[240] In the Authority's view, there were no positive characters in the programme; the good and the bad are not separated, there are no boundaries and every character considers violence as a way to resolve problems. Contrary to the statement made by the media service provider, the Authority upheld that private justice is considered a problematic element in the programme, the central topics of which were violence, revenge, and violent and many times expressly brutally resolved conflicts. There were no moral boundaries shown in the programme. Visually and acoustically enhanced violent scenes cannot be considered images that build the values of the relevant age group or provide a basis for thinking about or discussing the topic. As a whole, the Authority upheld that the topic appearing in the programme and the method of processing was not compliant with the criteria for age rating category IV. Due to the cumulative presence of violence and the naturalistic presentation of injuries, the programme could have a harmful influence on the personality development of viewers under eighteen; therefore it is to be classified into a higher age rating category.

The next described case is an example that the Authority considers expressly concerning scenes of motion pictures, where the creators try to resolve the effect of violence with humour. In the case at hand, the Authority imposed a total of 1.2 million forint in fines on the television media service provider because it classified and broadcast the action-comedy *Gunmen* (1994, Deran Sarafian) (and its previews) into age rating category IV rather than into category V.[241] The Authority found the intended humorous exhibition of the ambivalent friendship of the two main characters concerning, since the main characters help each other in one moment and attack each other in another, without any specific reason. The Authority did not share the view of the media service provider that one of the film's tools, humour, helps to keep a distance from what we have seen, and prevent the creation of fear. The Authority's examination upheld that the programme's viewers had to face several times images depicting homicide committed in various manners.

240 See, decision No 476/2013. (III. 20.) of the MC, which was confirmed by Budapest Administrative and Labour Court judgment No 3.K.31531/2013/4.

241 Decision No 1497/2013 (X. 9.) of the MC.

(iii) Sexuality

In view of the fact that the majority of the 16-year-olds themselves have more or a little sexual experience, the low-key visual depiction of private sexual activity and the verbal references to it are allowed within this age rating-category. Sexuality can exclusively be presented in a simulated way and without going into details, in view of the fact that naturalistic depiction requires a higher age rating category. Adolescents often use the media to obtain information on sexuality and on sexual relationships, therefore, special care is needed in terms of unusual sexual practices and aberrations and the atypical and extreme forms of sex; they cannot create the pretence that these extremes are part of everyday life and easy to accept, and they cannot encourage sexual experimentation. The view of openly presented sex scenes, without any kind of emotional ties, or feel of sexual responsibility can have harmful effects on the moral development of the 16–18 year age group. Where sexuality is coupled with violence, its lengthy and direct depiction is not accepted within this age rating category. An abusive or non-consensual sexual relationship cannot be shown as being desirable for the victim, or that the reason for the aggression suffered is possibly caused by her behaviour.

In a related case the Authority imposed a total fine of 900,000 forint on a television media service provider, because the media service provider classified and broadcast the motion picture *The Last Boy Scout* (1991, Tony Scott) (and its previews) into age rating category IV, ie, 'not recommended for audiences under the age of sixteen', although it should have been classified, due to the violent content (rough violence, swearing, unconventional lifestyle, sexuality) into Category V, 'not recommended for audiences under the age of eighteen'.[242] In the Authority's view, this action movie depicted sexuality in a way to be avoided in programmes for audiences under the age of sixteen. It is a primary element in the story line when it turns out how one of the main characters lost his job as a body guard. The main character was the bodyguard of a senator, and he protected the hotel room of the politician. Desperate yelling of a girl could be heard from behind the door of the room. The main character rushed into the room, where he found the senator with a belt in his hand. Next to this man, a woman crunched down, who was obviously being hit against her will. The sexuality directly presented was coupled with violence. According to the Authority's view, the view of openly presented sex scenes, without any kind of emotional ties, or sense of sexual responsibility can have harmful effects on the moral development of the 16–18 year age group.

In another case, the Authority imposed a fine totalling 80,000 forint on a public service television media service provider because it classified and broadcast the motion picture *Lolita* (1997, Adrian Lyne) (and its previews) into age rating category IV, which should have been classified into Category V due to the sexuality presented in that film.[243] In the Authority's view, the work presenting the issue of paedophilia is made particularly concerning by the fact that the characters suffer and enjoy in parallel a situation that society finds disgusting, and they use each other in an inhuman way. It is of concern, furthermore, that, in the description of this affair, the main character is presented as an innocent and frail man, who is nothing else but the victim of desire and mainly of Lolita. There are phases where the main character gradually abuses the young girl and forces her into sexual games that are disgusting according to society's benchmark values. From sleeping in the same bed they gradually move

242 See, decision No 476/2013. (III. 20.) of the MC, which was confirmed by Budapest Administrative and Labour Court judgment No 3.K.31531/2013/4.

243 See, decision No 1047/2014. (X. 28.) of the MC.

on to sex, and in the meanwhile the perverted desires of the man come more increasingly to the surface. At the peak of the story line it becomes obvious to the man that the girl fails to return his feelings but this fact forces the man to chain the girl to himself with all possible means, including bribery. At some point in their relationship, the man is already buying the girl's favours for money. Lolita collects the one and two dollar coins in order to break out from the horror of the man one day. Despite the fact that no uncovered body parts can be seen in sexual context anywhere in the programme, and the sexual intercourse and other practices are presented implicitly, the sexual tension is there all the time. This comes mainly from the fact that the camera follows Lolita's movements from the point of view of the paedophile man. It can be often seen that the camera follows the upper body of Lolita, emphasising her young age, looks at the movement of her legs and follows her bottom. The sexual camera settings usually present kisses and touches close up.

In the Authority's view, the adaptation of the paedophilia issue requires an adult and mature audience. The programme's higher age rating category classification is justified by the unusual sexual practices and aberrations, and the images presenting atypical and extreme forms of sex; since special care is recommended in connection with them, and they cannot create the pretence that these extremes are part of the everyday life and easy to accept and they cannot encourage sexual experimentation.

e. Programmes Not Recommended for Audiences under the Age of Eighteen: Category V

The Authority considers that programmes not complying with the criteria specified for lower categories but not meeting those in Category V must be classified in this category.

The Authority lists the following examples for programmes classified in Category V:

- action movies (eg, *Soldier, Out for Justice, Lethal Weapon 4*), thrillers (eg, *Cape Fears, Les Rivières pourpres, Hannibal*), crime series (eg, *Criminal Minds*), and horror movies (eg, *The Exorcist, Halloween, Scream, Dawn of the Dead*), where violence appearing as a central topic is coupled with naturalistic presentation, but fails to cross the border where the work can trigger joy in the violent scenes seen and make the viewer indifferent to violence;
- work capable of praising violence or judging it without criticism (eg, *A Clockwork Orange, Natural Born Killers, Fight Club*);
- erotic films, the central element of which is the more or less explicit depiction of sexual activities (eg, *Nine and a Half Weeks, Basic Instincts, Emmanuelle*);
- episodes of reality shows when the contestants' sexual activity appears openly—but not with pornographic openness, furthermore erotic talk shows where sexual topics are handled with full openness and in great detail, and the invited guests and the film clips also serve as means of sexual arousal;
- works capable of reinforcing or judging without criticism discriminatory or prejudiced attitudes (eg, *American History X, Torrente, el brazo tonto de la ley, South Park*);
- works capable of encouraging or judging without criticism drug consumption (eg, *Half Baked*);
- talk shows where participants are encouraged to apply violence and are rewarded for it (eg, *The Jerry Springer Show*);
- show programmes where dangerous and risky behaviours appear in an attractive way, as a model to copy (eg, *Jackass*).

Harmful Elements Mentioned in the Recommendation in Category V

(i) Negative Behaviour Pattern

Works belong to this age rating-category that are characterised by the presentation of discriminatory views, and this conduct is presented without condemning it, in a simplistic manner, sometimes with humour, via cult characters such as episodes of *South Park* or *Torrente or el brazo tonto de la ley*. It is not allowed however, to depict aggression as harmless or legitimate against people who suffer violence due to their different looks, cultural and social self-determination, customs, or way of thinking.

Programmes presenting dangerous and very risky behavioural patterns in an attractive way—even indirectly—that invite copying, and the characters showing them are set on a pedestal due to their bravery, such as episodes of *Jackass*. Works where the use of drugs appears as an attractive way of life, and due to their easy style they understate the consequences of drug use or the drug trade, thus they can be capable of triggering curiosity to try drugs are to be classified into this age rating category.

(ii) Depicting Violence

With regard to violence, in these programmes there are drastic, brutal, particularly cruel violent acts, and the depiction of violence is detailed, lengthy, and naturalistic. These include action movies, thrillers, and crime series, where an impression is made mainly via the naturalistic depiction of violence. The level of harmfulness of the message conveyed is also an important criterion to be examined, since in the above mentioned genres, propagated arbitrary justice (in connection with positive characters, such as in some of the revenge films) or praised violence (eg, certain film on serial killers) occurs in numerous cases that are not always condemned or cannot be offset by the closure of the story, therefore these works are not necessarily comprehensible by viewers under 18. Usually the harm is not mitigated by adding comedy elements to the above contents, since humorous scenes might be capable of hiding the seriousness of the aggression seen. Most horror movies, where the joy of watching a movie is linked to the chill from the dark sides of humans, demonic forces and the eradication of the human race, can be classified into this age rating-category.

(iii) Sexuality

In terms of the allowable level of sexuality, works showing sexuality directly and naturalistically but not meeting the criteria set for Category VI belong here. Erotic films, the main element of which is the more or less explicit presentation of sexual activity, can be classified in this category. In law enforcement practice, erotic can be interpreted as a version of presenting sexuality, the human body, many times in an artistic manner, that brings an artistic experience for the recipient, not focused on intercourse as a fact but on the human body and its beauties. Although some of these works depict sexual intercourse in detail, in their natural reality, and that can seem, taken from the entirety of the film, even pornographic, the scenes are not an end themselves, but they have a dramaturgical function; the open depiction of sexuality does not necessarily (or exclusively) serve to raise or satisfy the viewers' desires. Also, works in nonfictional genres showing extreme forms of sexuality or giving examples of sexual relationships without emotions, or put unselective sexuality into a positive light (by emphasising the joy without mentioning the hazards) are also to be classified into this

category, since the thinking of the under 18 age group is not mature enough to interpret the meaning of the images seen or the experience lived.

f. Programmes with Severely Harmful Effects on Minors: Category VI

Programmes to Be Classified as Category VI

In view of their content, or the way the topic is processed, programmes classified into Category VI are seriously harmful to the personality development of minors, therefore it must be excluded that viewers under 18 years of age are able to watch these programmes. To this end, these programmes can be published exclusively via on-demand media services, and in linear audiovisual media services where it is ensured, via various technical solutions, that programmes are accessible only to viewers above 18 years of age. It is to be highlighted that programmes that are accessible for adults freely and legally are different from programmes subject to an absolute ban, ie, that are illegal content irrespective of the viewers' age or method of access, because they breach human dignity or are capable of incitement to hatred against religious or other groups, ethnicities, etc., or discrimination, or they depict child pornography.

Although the legislator lists the extreme and unjustified violence and pornography as criteria for classification into Category VI, the 'particularly via' term indicates that this listing is not exhaustive. This category does not apply only to the cases highlighted in the text of the law as analysed below in detail (pornography or extreme, and/or unjustified violence) but other content can also give rise to the conclusion that a programme is capable of seriously negatively influencing the intellectual, physical or moral development of minors.

Harmful Elements Mentioned in the Recommendation in Category IV

(i) Negative behaviour pattern

Such other content can be those possibly resulting in self-harm by minors, such as advocating or praising suicide, communicating specific instructions on the ways in a manner that reasonably carries the risk of being copied or obviously encourages the consumption of drugs.

(ii) Depicting Violence

In the Authority's interpretation, programmes display violence in an extreme and/or unjustified manner where (i) individual violent acts are so lengthy or depicted in such cruel detail that goes far beyond the level necessary from the dramaturgic point of view; (ii) violence plays no integral role in unfolding the story, the characters or the topic, or where violence is present without any recognisable reason, just for its own sake, based on the assumption that violence is attractive to viewers, raises their awareness and therefore warrants higher viewer numbers. In deciding whether the presence of violence is justified or unjustified, the genre (news, documentary, light entertainment) of the programme gives an important aid, as well as the circumstances in which the violence is depicted (information, education, awareness raising for a charity, social criticism, artistic, entertainment, attracting audience / tabloid). While the editing of images of a bloody massacre can be possibly well-founded for a

news programme, it is not accepted, eg, to deal with a criminal lifestyle as a way of making someone's living, where killing people is treated as a task that can be done at any time for money in an entertainment programme with easy and relaxed intonation.

Category VI contains programmes where violent acts are depicted in a sadistic manner, ie, joy over committing the violence or the victim's suffering is dramaturgically stressed, and the depiction of violence can have an effect that is able to trigger or reinforce a cynical, emotion-free behaviour, indifferent towards the fate and suffering of others. Such works are characterised by the depiction of the extreme brutality of violence in such detail that it not only aims to trigger fear but also to induce joy over the watched content. In this most horrific version of horror movies the pathogenic instinct and bizarre conduct of the main character is in the foreground, the presentation of victims is unrecognised, their role is degraded to an object for presenting extremely drastic ways of death and/or torments. Most of these works pose no intellectual challenge to the viewer; they just aim to trigger instinctive feelings without any associated message. The scary credibility is reached via the hyper-realistic depiction of images; not sparing even the most revolting details of mutilations or eviscerations for the viewer.

(iii) Pornography

The act fails to define pornography, therefore the Authority segregated two notional elements, on the basis of studying the legislation on pornography and grammatical interpretation, ie, a) open depiction of sexuality and sexual acts; b) sexual arousal. Since none of the definitions is exact enough to enable clear boundaries to be set between the erotic and pornography, the Authority uses a margin of discretion under the guidance given by the Supreme Court to decide whether a programme with a scene of directly depicted sexuality amounts to pornography, and/or capable of seriously negatively influencing the moral development of minors. In pornographic works, the human body appears as a technical utensil, serving exclusively to reach maximum sexual enjoyment, and targets instincts. The sexual socialisation of adolescents is still incomplete and unstable, therefore pornographic depictions for this age group can make the wrong impression that in real life partnerships and sexual relationships works in the same way, therefore, it can compromise their future contacts and the development of their personality.

Pornographic works that mainly or exclusively seek to arouse the viewer are characterised by the fact that they do not depict the emotional aspects of sex, and they suggest offensive sexual attitudes, violating human dignity. Their message is to show impersonalised sexuality as desirable and normal. Rendering sexuality by degrading human dignity and emotions belongs to pornography, as long as there are elements compromising the healthy psychosexual development of children, such as (i) the depiction of sexuality is free from any kind of credible emotional relationship links; (ii) it focuses on enjoyment in absolute terms; (iii) the human rendering is reduced to a level of a sexual object, interchangeable at any time, serving only the purpose of satisfying sexual desire.

Works where various sex scenes follow each other without any link can be considered pornographic or, where there is a minimal story line, it only serves the purpose of create an occasion for sexual intercourse between the characters that otherwise have no personal relationships. This is more true the more frequently partners are changed and the more participants the sexual act has. Where, apart from the physical satisfaction, there is any

other credible motivation present in the work, be it love, friendship, or disappointment or revenge, it is probably not pornographic. Finally, language can be an orientation factor in the classification, the high proportion of obscene, vulgar expressions, sound effects suggesting sexual enjoyment, such as moans and groans in the sex scenes, in addition to other elements suggesting pornography, can reinforce classification into Category VI. The Authority highlights furthermore, that in certain cases a single explicit sex scene can justify the seriously harmful effect on minors.

Since reality shows expressly draw the attention of the young age group, the Authority therefore expects compliance with stricter criteria for sexual content. The Authority refers to the Supreme Court's position, under which sexual intercourse in front of several participants, in the broad publicity offered by the television, violates good taste, manners, and morality to an extent that is capable of seriously negatively influencing the moral development of minors.

In addition to the above, the healthy psychosexual development of adolescents can be seriously compromised where the work, in addition to rendering sexuality, also advocates physical and other violence in order to enforce sexual interests, or possiblye shows sexual violence as enjoyable for the victim, or, looking at the media content in its entirety, handles one of the sexes in a degrading manner, violating their human dignity.

At the same time, the Authority does not consider as pornographic any work where nudity or the naturalistic rendering of sexual acts take place to create an artistic experience or shows the beauty of the human body, or possibly has scientific or training purposes. In this case, depiction is not pornographic, even where it shows genitalia and a sexual act. For this, however, it is indispensable that the act does not primarily aim to trigger sexual excitement, and in deciding on this, the environment of the appearance (eg, information website, teaching aid) can assist.

D. Closing Thoughts

As an essence of rules on the protection of minors it can be concluded that they set, in addition to content requirements for commercial communications and the presentation of minors, typically programme editing limits to the media service providers. With the exception of the most extreme cases (programmes to be classified into Category VI), programmes rendering elements harmful to the minors' development can be published in linear media services, but the airing times and forms (indication of a sign) are subject to restrictions.

From the examination of the cases related to age rating classifications and/or publication, which make up the majority of the cases, it can be concluded that there are disagreements between the Authority and the media service providers, in particular in connection with distinguishing categories III and IV, furthermore between IV and V. Since for the relevant categories the start time of the programme depends on the classification, media service providers presumably classify their programmes into a lower category than required, hoping for higher viewing rates via the earlier start time. The law enforcement practice of the Authority and the courts can be considered to settled and consistent; and also uniform in the interpretation of the substantive law.

X. Restriction of the Freedom of the Press in View of Right of Reply in Media Law Practice

A. Constitutional Grounds for Right of Reply

The institution of press remedy was introduced in the Hungarian legal system by Act XIV of 1914 on the Press. On the basis of that act, the person who was the subject of open or surreptitious communication of false facts by the press (which, in those days, only meant periodical papers) or misrepresentation of true facts could call for the publication of a remedial statement (Articles 20–23). The rules for right of reply applicable only for the publication of facts were 'revived',[244] basically in its original form, by the 1977 amendment to the Civil Code, which regulation was carried over without substantial changes during the comprehensive reform of media law in 2010 into the PFA (Article 12).

The constitutional foundations of the right of reply, which has a long history, were examined by the CC in 2001 (57/2001 (XII. 5.) AB), specifically in the context of the preliminary norm control of a proposed amendment to the Civil Code. The President of the Republic of Hungary submitted the Act on the Amendment of the Civil Code, adopted by the Parliament on 29 May 2001, before its promulgation. In his opinion, the right of reply that the Civil Code Amendment intended to enact in addition to the concept of remedy, on the basis of which the 'victim' of the publication of an opinion or assessment violating personal rights in the press would have demanded to publish his own opinion or assessment, in addition to other statutory claims, was contrary to the freedom of the press warranted by the Constitution. Furthermore, the Civil Code Amendment intended to make it compulsory to impose of a so-called public interest fine for infringements of personal rights committed via the press, the amount of which was ordered to be set in a way that would deter the wrongdoer from further infringements (Article 84(2)). Out of the new rules envisaged for the public interest fine, the proposer found only the provision on the amount of the fine to be unconstitutional; more precisely, it violated the rule of law principle and was contrary to the freedom of speech and the freedom of the press.

When dealing with the motion, the CC also made findings with regard to the rules of right of reply, since the right of reply to a statement of fact is a right of reply in its narrower sense. The Constitutional Court held on the right of reply in its broader sense, ie, both to statements of facts and statements of opinion, that it constitutes a restriction to the freedom of the press, and more precisely to editorial freedom, since it forces the press to publish a statement that it would probably have not published if it had a free choice. The right of reply could imply that opinions would not be published subject to the risk of the obligation to publish a reply, which would mean an indirect restriction to the freedom of expression. Furthermore, the obligation to reply constitutes a burden and implies costs and loss of revenue; foreseeing such a disadvantage can have a deterrent effect on the publication of opinions.

In line with its earlier decisions, the CC initially stated that the freedom of opinion and of the press can be restricted by law, in exceptional cases, provided it does not infringe the actual contents of these rights. It held that these rights can be restricted to a limited extent if

244 Act IV of 1959 on the Civil Code was significantly amended by Act IV of 1977 (Civil Code Novel) as a result of which Article 79 of the Civil Code dealt with the right of reply in the chapter on personal rights.

political debate and the criticism of the State are affected, since the freedom of expression and the press play a particularly important role in the maintenance of a democratic system and the formation of public opinion. At the same time, these civil liberties have no or a limited role in the protection of democracy where public opinion is formed by an actor in economic life on another actor, out of economic interests; in such cases, civil liberties can be restricted to a greater extent.

When deciding on the issue of whether the restriction of the freedom of the press through the right of reply is constitutional in general, the CC examined the purpose of the right of reply. In this context, the CC upheld that the right of reply, together with the remedy, serves, on the one hand, the protection of the dignity and reputation of the person affected by the unlawful published material, and, on the other hand, it protects the right of the public to obtain the information required to form an opinion by being informed of the true facts and the opinion of the person concerned. In connection with this latter finding, the CC emphasised that freedom of the press includes, in addition to the freedom of expression, the right to obtain the information required to form an opinion.

The Court considered an earlier decision as particularly important for this issue (30/1992 (V. 26.) AB), in which it upheld that a law restricting the freedom of expression is 'more prominent if it serves the enforcement and protection of another fundamental right; and less prominent if it protects such rights secondarily only, via an "institution"; and the least prominent if its subject is an abstract value itself.' In another earlier decision (36/1994 (VI. 24.) AB), the CC highlighted that, although it is justified to differentiate between the assessment and the statement of facts when dealing with the restriction of the freedom of expression but 'the human dignity, integrity, and reputation, also subject to constitutional protection, can be an external limit to the freedom of expression appearing in the form of assessment, and in general, to protect those even the enforcement of criminal law liability cannot be considered *disproportionate and thus unconstitutional*.' This cited decision takes into account that the various types of public opinion published cannot only result in the violation of reputation but they can violate human dignity irrespective of that. Accordingly, the right to freedom of expression and the freedom of the press can come into conflict with the right to human dignity, in addition to the right to good reputation. The right to human dignity, in line with the jurisprudence of the CC from the outset, is a fundamental right of particular importance (23/1990 (X. 31.) AB).

When dealing with the right of reply in general, the CC also took foreign experiences into account. It referred the practice of Germany and Switzerland, which only allow choice with regard to the statement of facts, while the French and Spanish regulatory systems guarantee the right of reply for statements of opinion, in addition to statements of fact. The European Commission of Human Rights examined the admissibility of the Spanish rule on the right of reply on the basis of the Rome Convention,[245] and found that the Spanish regulation was a necessary and proportionate measure, because it restricted the freedom of expression in order to protect the reputation of others. The Commission also held that the publication of a reply ensures more complete information to the public, because it provides information

245 Protocol to the Convention on the Protection of Human Rights and Fundamental Freedoms, dated on 4 November 1950 in Rome.

from several sources.[246] In connection with the above decision from the Commission, the CC referred to the Decision of 2 July 1974 of the Council of Europe, in which a Recommendation on the rules of the right of reply was adopted. This Recommendation advocates the protection required against statements of fact and expressions violating good reputation, integrity and human dignity, and asks for the establishment of an appropriate legal instrument to achieve it. The decision of the Parliamentary Assembly of the Council of Europe on the ethics of journalism[247] invited Member Countries to implement the referred Decision of the Commission of Ministers, for the sake of uniform regulation.

After consideration of the above deliberations, the CC took the position that 'the right of reply in its broader sense is in general a constitutional restriction to the right of expression and the freedom of the press.' After it clarified that the right of reply in general is not against the Constitution, the Court examined the constitutionality of a provision held to be of concern by the proposer, ie, whether the result to be obtained subject to the set manner of exercising the right of reply is proportionate to the harm caused. In this regard, the CC examined two characteristic features of the regulations set in the Civil Code Amendment. On the one hand, the Civil Code Amendment did not restrict the right of reply; as such, the court would not in general be allowed to set limits on the exercise of these rights (eg, the reply itself could be of an infringing nature, it could be significantly longer than the basic published material, it could go beyond its content, and in the event of several concerned persons, it could be granted separately, without any limit). On the other hand, the Civil Code Amendment provided for a mandatory imposition of a fine as an additional sanction. In view of these characteristics, the CC established that the rule of right of reply as set out in the Civil Code Amendment restricted the freedom of press, and indirectly the freedom of expression, to a degree which was not justified by the protection of human dignity and reputation, therefore it was unconstitutional. However, the Court did not find the provision of the Civil Code Amendment that failed to set a cap on the public interest fine that could be imposed to be unconstitutional (ie, contrary to the rule of law principle). The Constitutional Court highlighted that in Hungarian law, the amount of compensation is not set by the law in advance, either for pecuniary or non-pecuniary losses. The law sets the conditions for compensation obligation only in general terms. The preliminary non-specified nature of the applied sanctions is linked to the specific nature of the sanction, and the infringement of the rule of law cannot be established on this basis.

The criticisms by the CC Judges linked to the above outlined decision by the CC challenged, amongst other issues, that the substantive part of the decision failed to state the unconstitutionality of the provision on the mandatory imposition of the public interest fine on the grounds that the motion did not cover that provision, and therefore, the Court acting in the framework of the preliminary norm control could not examine the relevant provision.[248] Probably, as result of the strong criticisms from the profession and society to the Civil Code Amendment and the above described Constitutional Court decision, none of the provisions of the Civil Code Amendment made its way into the Civil Code; nevertheless the decision of the Court is important for the issue at hand.

246 *Ediciones Tiempo S.A. v Spain*, App No 13010/87, judgment of 12 July 1989, DR 62. 247.
247 Decision No 1003, adopted on 1 July 1993, [27].
248 Minority reports by CC Justices Ottó Czúcz, András Holló, and László Kiss.

B. Legislative Background to Press Remedy

I have already mentioned at the beginning of the previous Section that the current rules for the right of reply are laid down in Section 12 of the Press Freedom Act, applicable to all media content, ie, for content offered in all media services and press products. According to this, if false facts are stated or disseminated about a person or if true facts related to a person are misrepresented in any media content, that person may demand the publication of a corrective statement suitable for identifying the part of the statement that was false or unfounded, or the facts affected by the misstatement, while also presenting the true facts.

This corrective statement shall be published in a manner and to an extent similar to the contested part of the statement, (a) for daily newspapers, online press products and news agencies, within five days; (b) in the next issue / edition to be published after eight days for other regular publications (such as periodicals); (c) within eight day for on-demand media services from receipt of the respective request. For linear media services, the correction must also be published within eight days from receipt of the respective request for on-demand media services, in a manner similar to the contested part of the statement and during the same time of day in which the contested part was published.

The above rules for the right of reply, effective as of 1 January 2011, are essentially the same as the provisions of the Civil Code that were effective for more than 30 years.[249] Three differences are worth mentioning: (i) on the one hand, the Civil Code set a longer deadline for the publication of the corrective statement, eight days following the receipt of the request, instead of five days; (ii) on the other hand, the Civil Code did not provide for Internet press products, while they have been subject to regulation by the Press Freedom Act; (iii) finally, the Press Freedom Act introduced a new condition with regard to the manner of publication of the corrective statement, ie, the corrective statement must be published in a manner and to an extent similar to the contested part of the statement.

The Press Freedom Act has not changed the essence of the press remedy's procedural rules, either. The procedural rules continued to remain in the Act on Civil Procedure,[250] since in the event of a refusal of a request to publish a correction the requesting party can bring an action, in an unchanged manner. The remedy procedure has two stages. In the first stage, the person or entity requesting correction has to request correction, within 30 days from the publication of the contested published material, from the media service provider, the editorial office of the press product, or the news agency in writing. The publication of the correction requested in time can only be refused if the truth of the content of the request can be refuted straight away. Where the press fulfils the request for correction, the procedure is closed and it does not get to the second stage.

The precondition for initiating the second (court) stage is the lack of success in the first stage, ie, the failure of media service provider, the editorial office of the press product, or the

249 Article 79 of the Civil Code: '(1) Every person whose personal rights are violated by an opinion or assessment published in a daily newspaper, periodical (periodical paper), radio or television can claim the publication of a statement, in addition to the other statutory claim suitable to identify the part of the statement that was false or unfounded, or the facts affected by the misstatement, while also presenting the true facts (correction). (2) The correction must be published within eight day for daily newspapers, for periodicals and newsreels in the next issue in the same manner, for radio and television at the same time of the day as the contested communication was published, also within eight days.'

250 See, Chapter XXI of Act III of 1952 on Civil Procedure (Sections 342–46).

news agency to fulfil a request for correction. Then the requesting party can bring a claim, which cannot be connected to or joined with another claim (such as the action brought for compensation for the damages caused by the infringement of personal rights). This action must be brought within 15 days from the last day of the publication deadline; however, in the event of failure to meet this deadline, an *in integrium restitutio* can be applied for.

In the Statement of Claims, the content of the requested correction statement must be specified; it must be verified that the applicant requested correction within the statutory deadline, and, for daily newspapers, periodicals, and regular publications, a copy of the issue containing the contested material, for Internet press products, a printed copy of the contested published material (if available) must be annexed to it.

The court in whose territory the official address / place of residence of the editorial office of the press product, the news agency or the media service provider is located is competent to hear the case. The court processes press remedy cases as a matter of urgency, meaning that a trial must be set for the eighth day after the submission of the Statement of Claims.[251] No *in integrum restitutio*, counterclaim, or suspension is allowed in the case, and court injunctions may not be issued. The first trial can be held even in the absence of the applicant or the defendant. However, if both parties are absent from the first trial, the procedure must be terminated.

Evidence can only be taken with regard to material available at the trial and which can be capable of demonstrating the truthfulness of the contested statements of fact of the published material or to refute the Statement of Claim immediately. Evidence can be taken regarding proof immediately offered by the applicant. The trial can be postponed for a maximum of eight days only where it is requested by the applicant or the evidence already revealed makes successful proof likely. If the court grants the application, it orders the defendant to publish a corrective statement with the content set by the court, setting a deadline for it, and orders it to pay the costs incurred.

The press remedy action allows for a two instance court procedure. The parties can lodge an appeal against the decision made by the court of first instance; the court of second instance is required to deal with the case within eight days following the receipt of the file at the latest. Re-opening the proceedings may not be requested against a final judgment made in press remedy cases; however, as an extraordinary remedy, a review can be initiated against the second instance decision on the grounds of infringement of the law.

C. Case Law

In view of the fact that the essence of press remedy and/or the rules of an action for press remedy have not changed during the past nearly four decades, the courts still take the final court judgments, decisions of principle, and decisions that set the path for the interpretation of the legislative provisions into account. Below I detail the key content elements of the press remedy requiring interpretation in the law enforcement practice via the description of the case law:

251 Unless the submission of the Statement of Claims was late, in this latter case the court will dismiss the action without issuing any summons.

– subject of the press remedy;
– deadline for the submission of the request for correction;
– the purpose of the correction; the way of examining the contested published material;
– facts of the case giving rise to correction;
– lack of applicability of the correction;
– method and content of correction;
– bringing a remedy for action;
– the objective liability of the press and the burden of proof.

i. Subjects of the Right of Reply

a. Party Entitled to a Correction

The first part of the CC Position No 13,[252] setting out the conditions for bringing a press remedy action, determines the persons eligible to request a correction. Under this, a correction can be requested by a person whose personal rights have been violated by a false statement and/or misstatement of facts. Primarily it is the person to whom the press publication refers by mentioning his/her name or otherwise, ie, whose person is identifiable from the content of the press publication (BH1993. 422.). However, a person can be referred to without a name, therefore correction can be demanded by a person not identified by name but the unlawful publication relates to that person and they can be recognised from the content of the press publication in some way. In a specific case the court stated that to establish the infringement giving rise to correction it is sufficient if the recognition of the person (entity) affected by the press publication became possible only in a narrower professional or other circle. The infringement is not conditional upon recognition of the subject of the publication by all and it is also not necessary that recognition becomes possible over a broader scope (BH1991. 59.).

This Position deals with the case where a press publication affects the personal rights of several people at the same time. In this case, any of the affected persons can request correction but only in their own name, and the content of the correction can only be limited to the person enforcing a claim. The reason for this is that correction is an instrument of the protection of the person that can only be enforced in person. In line with this, the court upheld in a specific case that the affected person can request the correction of those statements of fact of a press publication that relate to that person.[253]

Since, unlike the current regulations, the old Civil Code rule on correction failed to specify for the requesting party whether it can be a 'person' or also 'an entity', it was uncertain in practice whether legal persons are entitled to the right of reply or not. In view of this, the Position highlights that press remedy, by its nature, cannot be restricted to the protection of private individuals, therefore, also legal persons can enforce claims for correction if the challenged publication identifies the legal person by its name or refers to a legal entity in any other way that the legal person can be identified through the content of the publication.

252 The original number of the Position was CC No 433 (BH 1984/5); renumbering was ordered by CC Position No 444 (13 June 1985; BH 1985/8).
253 BDT2014. 3210., [I], first sentence.

One of the court cases expressly highlighted that a limited liability company can also enforce a press remedy claim in the event of misstatement of facts violating its reputation (BH1993. 22.); at the same time, the body of representatives of a local authority has no legal capacity, therefore, it cannot be involved in a press remedy case as a party, since it is not a legal person.[254]

The court dismissed the case of a factory engaged in producing baby food, since the article on past sell-by-date baby food available in shops did not identify the producer, either by name or by way of suggestions. The author of the article challenged the activities of the trade and the negligence of shops exclusively; only the marketing of past sell-by-date tins of food was criticised. At the same time, the article was expressly positive with regard to the quality of tinned baby food; it considered them as state-of-the-art, expressly tasty and absolutely sterile and rich in vitamins. In view of all these, the applicant suffered no harm in any way; the article contained no criticism whatsoever of the applicant company, and the applicant was not identifiable from the article (BH1985. 184.).

This position also mentions the no correction can be requested by a legal person on behalf of its employee, member, or officer if the published material exclusively specifies one of its employees, members, or officers. Personal rights can be enforced personally only; the employee's demand for correction cannot be enforced by the employer. An employee, member or officer affected by the press publication can request correction in person even if this injury is otherwise related to their position or tasks. However, it does not exclude the employer's request for correction in its own name if the press publication also harms the legal person. The court upheld in a specific case in connection with the above referred provisions of the Position that the representative of a legal person can act in their own name where the press publication affects not only the legal person, but him/her in person.[255] However, nothing restricts the right of the affected person and their employee to request correction against the challenged press publication separately, even with regard to the same statement of facts (BH1999. 108.).

Recently the jurisprudence replied to the question whether the successor of a legal person can seek protection via press remedy on the grounds of damage to its predecessor. The court justified its negative reply explaining that the applicant's predecessor was entitled to the right of good business reputation during its time of activity under that specific name, since the applicant's predecessor could be identified via that name. The defendant criticised the activity of the applicant's predecessor under its own name and not that of the successor. After the termination of a company under a given name, no person is entitled to enforce a claim for correction on this basis. Hence, the applicant as successor is not concerned in person, therefore it cannot rightly make a grievance of what was written on its predecessor (BH2014. 176.).

In another case, the question of law with particular importance was whether a person challenging a declaration that the press attributed to him can seek protection via press remedy. In this context, the court stated that the publication of the fact that somebody made a statement to the press on a specific issue is considered to be a statement of fact for the purposes of correction, and serves as a basis for correction if false (EBH2004. 1021.).

Also, the court replied to a question of particular importance in the context of a specific case, of who is entitled to request a correction of untrue published material harming the

254 BDT2011. 2481., Part III.

255 BDT2014. 3210., [I], second sentence.

public interest (BH1980. 83.). According to the facts of the case, a weekly periodical started to write on issues related to a condominium, the construction of which was organised by a law firm in Budapest. The article contained statements giving rise to correction, not only in connection with the law firm named specifically, but also regarding lawyers in general. In view of the fact that the Bar Association is responsible for the protection of rights related to the exercise of the lawyers' profession, and law firms operate under the management of and are supervised by the Bar Association, the Budapest Bar Association requested correction from the periodical in question.
However, the claim of the Bar Association was dismissed by both the court of first instance, and second instance on the ground that the Bar Association's action is not admissible since personal rights can only be enforced in person.

Due to the requirement of claim enforcement in person, the legal person Bar Association cannot act on behalf of its member in order to remedy the harm to the personal rights. However, the court of second instance added that, since the harm suffered by lawyers in general is capable of harming public confidence in lawyers, untrue published material with such content violates public interest. The Bar Association, as a professional association, is not entitled to bring an action, even to protect this public interest. However, the court of second instance referred to a rule of the Civil Procedure in effect before 31 December 2010,[256] ie, if untrue published material harms public interest, the correction can be requested by the competent minister, in addition to the affected person. The competent minister for lawyers is the Minister of Justice, therefore in this case the Minister of Justice could have initiated a press remedy procedure. Since the cited provision had been repealed in the meantime, no correction can be requested successfully at present in the interest of the public.

b. Party Required to Make the Correction

Under the effective provision of the Civil Procedure, the affected person is entitled to request the correction from the media service provider, the editorial office of the press product or the news agency, and/or to bring an action against them if they fail to fulfil the request for correction. Under the relevant provision of the MA (Article 203(41)), media service provider means the natural or legal person having editorial responsibility for the selection of the media service, and determines the compilation thereof. Editorial responsibility means liability for the actual control during the selection and compilation of the media content. The definition of the press product can be found both in the PFA (Article 1(6)) and in the MA Article 203(60), but the law fails to define the editorial office of the press product and the news agency and so, in practice, the editorial office and news agency can be defined in the everyday meaning of these words. Otherwise, the editorial office of the press product has no civil law capacity, but it has legal capacity in a press remedy action, ie, it can act as a party.[257] Where the news agency has no civil law capacity, it can also nevertheless act in the remedy.

256 Second sentence of Article 342(1) of Act III of 1952 on the Civil Procedure as effective at the time of passing the judgment: 'Apart from the affected person, the correction can be requested by the competent minister (head of the national administrative body) if the false published material violates the public interest.'
257 See, eg, the Commentary to the Civil Procedure and Decision 2/2015 (II. 2.) AB.

In practice, it was disputed whether an article published in an unlawfully produced press product can be subject to a correction procedure. This question arose in connection with a specific case, where the printed publication containing the challenged article could not be considered as a periodical paper since no date was indicated on it. In view of the fact that, under the laws in effect back then, the publication could not be considered as a periodical paper, therefore a press product, the court of second instance delivering the final judgment could not see a press remedy action to be possible.[258]

In line with the above, a final judgment in 2006 established the lack of applicability of the correction for an online website, since it was not considered as periodical paper. It is a fact beyond doubt that the website operated by the defendant embodied the essential elements, functions and effect of a periodical paper (and the court of second instance shared this argument by the applicant), nevertheless it could not be included in the definition of the periodical paper, and therefore, that of the press, since it failed to meet the formal requirements set by the law—it failed to contain the year and number of its issue, it had no imprint, name of the person responsible for the publication, place and date of reproduction, name of the person responsible for editing, and, last but not least, it was not included in the register of periodical papers. According to the arguments by the court of second instance, it must be examined above all whether the medium embodying the infringement is considered to be a press product that is eligible for correction at all, ie, whether the medium in this case is considered as a periodical paper. If the answer is negative, the action must be dismissed.[259]

Three years later, in 2009, a judgment of second instance took a contrary position to that decision, despite the fact that the law effective back then still failed to clarify whether online news portals and websites are considered as press. The case law replied to the challenges of our age before the legislator, and established that the claim for correction can be enforced irrespective of whether the operation of an information website is subject to a notification obligation, and/or whether it is included in an official register as a periodical paper. The court of first instance dismissed the applicant's action on the basis of the above described judgment from 2006. The court of second instance considered that if an online news portal as an electronic press product is engaged in media activities and has an imprint, it is published, updated, and available on an on-going basis and published articles, it has the essential and content elements of a periodical paper.

The fact in itself that an information website is not subject to a statutory notification obligation, and not listed in the register of periodical papers cannot mean that, despite its characteristic features and other statutory criteria, the specific instrument of correction cannot apply to it, due the specific nature of its publication. Registration cannot represent a primary criterion. The question whether an online forum is considered to be press must be decided on the basis of the media activities it is engaged in and its compliance with the essential criteria of a periodical paper. In view of this, it considered the news portal referred to by the applicant as eligible to be ordered to make a correction, and it ordered the court of first instance to continue with the trial of the case and to make a new decision.[260] The legislator

258 Pécs Court of Appeal, judgment No Pf. III. 20 465/2007/3, upheld by the Supreme Court in the extraordinary remedy (review), see, BH2009. 105.
259 BDT2006. 1340.
260 BDT2009. 2148.

approved the correctness of this later case law by enacting the PFA, which included online newspapers and news portals in the concept of press product.

The issue of whether a false statement published in paid-for material can result in a correction obligation is an issue raised in practice. The court of first instance gave a positive answer to this question in a case where the periodical paper published, in a lengthy paid advertisement, facts and opinion on a hunting club. However, the court of second instance overruled the first instance judgment and dismissed the applicants' action, stating that the editorial office cannot be ordered to publish a correction with regard to the content of a paid advertisement. The liability of the press covers only false statement of facts and/or misstatement of true facts published as information. Information meant, according to the law effective at the time of that judgment, the publication of facts, events, official publications, speeches and opinions, analysis, and assessments related to those via a press product.

Information had to be published well separated from paid advertising, therefore the final judgment concluded that paid advertisements cannot be included in the concept of information. However, the Supreme Court, acting in the extraordinary remedy (review), overruled the judgment of second instance, and declared it unlawful. The Supreme Court took the position, by agreeing with the first instance decision, that legislative provisions providing the opportunity for correction make no distinction in terms of the liability of the press according to the nature of the information embodying the statement of facts. Hence, the editorial office cannot be exempted from the correction obligation on the grounds of the manner of the statement of facts in itself. According to its content, the press publication subject to the case is part of a social debate and is not considered as an economic or political advertisement and, as such, it is obviously not considered as an advertisement. According to its content, a paid publication is considered as information, even if it was published by the editorial office exclusively for consideration (EBH2000. 299., BH2000. 441.).

ii. Deadline for the Submission of the Request for Correction

The Constitutional Court Position No 13 emphasised that the 30 day deadline, available for the person whose rights were harmed to submit the written request for correction to the press, is of substantive law nature since it is linked to the basis of the right to correction Namely, the law makes the enforcement of a claim related to press remedy subject to a preliminary request for correction within a specified deadline. The substantive law nature of this deadline implies that no *restitutio in integrum* is possible in the event of failure to meet this deadline.

In the above context, the Supreme Court upheld in a specific case that the correction request must be received by the addressee within the set 30-day deadline (BH1983. 15.). The purpose of this preliminary notification of claim is to provide an opportunity for the obliged person to make a voluntary correction. However, it is conditional upon the actual receipt of the request by the press. Where delivery takes place beyond 30 days, this is a forfeit failure, no *restitutio in integrum* is possible. Where the last day of the 30-day forfeit deadline is a public holiday, the deadline expires on the next working day.[261]

261 Article 3(3) of the Interpretative Provisions to the Civil Code.

For the purposes of calculating the press remedy deadline, the date indicated on the paper containing the unlawful published material must primarily be taken into account. An earlier date can only be taken into account as the commencement date of the deadline if the press organ can demonstrate that the injured party was aware of the actual article earlier, ie, the paper was distributed before its indicated date. However, where the distribution of the paper took place later than indicated by the date in the press product itself, the start of the submission deadline for the claim is the day when the distributed press product became available to readers. Namely, readers are not in a position to become aware of the unlawful published material at an earlier date (BH1986. 22.).

iii. Purpose of the Correction and the Way of Examining the Contested Published Material

With regard to the scope of the press remedy's application, the CC Position No 12 makes findings and gives guidance to practising judges.[262] This Position treats the correction as a specific instrument for the protection of personal rights that can serve indirectly the protection of other interests. However, it can only be enforced in the scope specified by the law and in line with the social purpose of this legal instrument. This Position stresses that the correction is not suitable for remedying any kind of harm to personal rights, but it can only be used for the protection of rights precisely specified by the law (namely good reputation). Correction can only take place for false statement of facts or misstatements of true facts (hearsay), and only if this infringement takes place via a press publication specified by the law and the published material relates to a specific person.

The Position also emphasises that the correction of false statements of fact and misstatements of true fact serves the interests of the press since it is a guarantee for the provision of credible information. In addition to protecting personal rights, correction also contributes to maintaining the credibility of the press. Information via the press is an important mean of shaping public opinion and social consciousness, and is able to fulfil this role if it provides credible information on true facts, and it makes no harm to the personal rights of others by its publication.

In deciding on the claim for a correction satisfying the above mentioned criteria, the general rules of the Civil Code must be applied, ie, those ensuring the proper exercise of rights, in line with their social purpose, meaning that the parties must act in exercising their rights and fulfilling their obligations in order to ensure the compliance of the claim enforcement with the set of *bona fide* and decency standards. In the event of an actual infringement of rights, the court must provide protection to the injured party, and thus, it has to facilitate true and objective information on the events of social existence by the press and to prevent the abuse of its position. At the same time, it must be ensured that the person requesting correction is not misusing the institution of press remedy by way of improper exercise of rights.

This Position provides guidance on the manner of examination of the press article subject to the correction request. On this basis, the press article must be examined as a whole. The challenged published materials and phrases must not be taken into account according to

262 The original number of this Position was No 432 (BH 1984/5); renumbering was ordered by CC Position No 444 (13 June 1985; BH 1985/8).

their formal appearance but to their actual content;[263] the parts of the press article belonging together must be assessed in their context, and also the established public views must be taken into account during the assessment. The challenged published material must be taken into account according to its generally acknowledged meaning in social contacts, and must be evaluated according to its actual content. Namely, in many cases, interpretation exclusively on a formal basis would be contrary to the objective and purpose of press remedy. Phrases used in the challenged published must not be examined out of context; parts closely linked or belonging together must be examined in their context. If the published article as a whole is true, in such cases minor (compared to the whole) details and inaccuracies, and irrelevant mistakes cannot serve as a basis for correction. In line with this, a judgment made in a specific case before the adoption of that Position upheld that details irrelevant for the information of the public and neutral for the personal rights of the person requesting correction cannot be examined and assessed without taking into account the other details of the published material (BH1983. 275.).

No correction can be used as means of protecting personal rights where the applicants fail to specify the statement of facts of the press article that allow for the conclusion that it violates personal rights. The Supreme Court concluded in a specific case, during the extraordinary remedy, that with regard to a person working as manager at a credit institution, raising the question of whether he was an owner, in itself constituted no harm to reputation. Namely, information on the owners of credit institutions is of public concern. In the extraordinary remedy, the applicants stated that they received shares, and thus acquired ownership in the relevant credit institution, and therefore, the fact assumed by the newspaper article was not false. The applicants failed to specify in the Statement of claim which statement of facts in the newspaper article served as the basis for the alleged negative assessment affecting them in person. In the absence of this, it is impossible to decide whether these negative assessments can be related to the applicants in person at all (BH1996. 194.).

iv. Facts of the Case Giving Rise to Correction

A press remedy can be based, eg, on the statement of untrue facts or misstatement of true facts. In a specific case, the court ordered the wrongdoer daily newspaper to make the correction by relying to the above, amongst others on the grounds that it falsely stated that the mayor's the Volvo was bought for 5 million forint, whereas its purchase price was 1,633,000 forint. With reference to the letter, because the same newspaper article, titled 'Variations in the Town Hall—out of law', failed to publish all budgetary concepts of the local municipality but only two of them, readers could thus not get a full overview of the local municipality's budgetary concept (BH1993. 423.).

The Constitutional Court Position No 12 furthermore highlights that unlawful publication can take place indirectly by suggestions, references, omitting certain facts of the case, and grouping the elements of the facts in a way leading to wrong conclusions. In such cases, correction must be possible if the actual content of the published material is capable of expressing false statements of fact and/or misstatements of true facts. It is obvious that a

263 See, in line with this, BH1983. 354., [II].

correction is due where the press misstates the truth by changing the meaning of an essential element of a statement or omitting or regrouping certain elements from the statement.

With reference to the above mentioned provisions of Position No 12, the court stated in several specific cases that publication of true facts, selectively taken out of their context, with missing content elements and in a way allowing for wrong conclusions, means the misstatement of reality (BH1989. 480., BH1990. 210.). In one of the specific cases, the court concluded that the whole of the challenged press article and its actual content expressed that the saving bank failed to terminate residential loans at discount interest rates (subsidised by the State), or to amend them by withdrawing the discount interest rates in instances where the completed residential property did not serve the owner's housing needs, but the owner exploited the property by renting it out, thus making significant profit. Since the profit from the loan contracts at discount interest rates failed to cover other loans, the saving bank collected the difference from the state budget. These statements of facts in connection with each other, and the opinion of the journalist (ie, that it is easier to draw from the budget than collecting the money on a commercial basis) suggest the conclusion that the saving bank violated its obligations as a credit institution, and thus burdened the state budget with payment obligations.

At the same time, this newspaper article failed to disclose that the legislation does not allow the savings bank to terminate or amend the loan contracts with discount interest rates if the owners subsequently let out the residential property built from the loan. Furthermore, the budget provides financial assistance to the saving banks to concluded loan contracts, but grants loans at discounted interest rates via saving banks as credit institutions. By omitting the fact that the saving bank acted only as an intermediary in this process, the published article wrongly suggested that the beneficiary of these subsidies was the saving bank and, by the failure to withdraw these discounted interest rates, the saving bank was further increasing the burdens on the budget. On the basis of the above, since the newspaper article misstated the facts on multiple occasions, the court found it justified to order the daily newspaper to correct these statements (BH1989. 480.).

Publication of images and/or comments made thereon can also give rise to press remedy. In a specific case, a daily newspaper was ordered to publish a correction, because on its front page it published the friendly bickering between the applicants with the title 'Is it the start?', in bold letters, and with the caption 'slap in the face, robbery, violence, murder—police stories on page 5'. The daily newspaper published a few images of the applicants on page 5, together with the police news. However, the applicants had nothing to do with the police news, and their personal rights were seriously violated by linking them with violent crimes. The court concluded that in the event of publishing images of people, the image and the related text must be assessed together when examining whether the publication expresses false statements. In this case, the images of the applicants did not portray violent acts, ie, the daily newspaper's attention-grabbing story, and the caption to the images on page 5, 'at least they hit each other', were not true, and the publication of the images taken of the applicants was misleading to the readers since the applicants were not involved in any way with the police stories described in detail on page 5 (BH1992. 456.).

In another similar case, the court of second instance upheld that the press violates personal rights, and is required to publish a correction if a published image and its caption render true facts of themselves, but the joint meaning of the published image and the caption misstates

reality (BDT2010. 2217.). In the court's justification was that, in journalism, the purpose of a caption is to explain the image, to clarify its content for the reader; they are closely linked and can be assessed jointly. By assessing the joint meaning of the image and the caption accordingly, it suggests to the reader that the applicant actor, hurt in connection with him leaving the Szeged National Theatre, used a hand gesture generally held vulgar and annoying by the public (a raised fist with erect middle finger).

In addition, press remedy is due where the press misstates reality by changing the meaning of an essential element of a statement, by omitting or regrouping certain arguments from the statement. In the related case, the defendant's periodical failed to publish the television interview with the applicant verbatim, but extracted parts of the statements made in the TV programme and cited them out of context. Hence, in the court's view, it misstated the facts, since the published partial replies of the applicant distorted the true facts and misstated reality (BH1983. 152.).

The press procedure can violate personal rights and the interests of credible information if, by changing the questions made to the subject of the interview without their consent, the original text of the interview is distorted. The relevant conclusion was made by the court in a specific case, because it agreed with the applicants that, by changing the questions made to the applicant significantly, it can create the impression in the reader that the applicant is unable to put forward appropriate arguments to these questions. The court ordered the defendant's paper to re-publish the interview with the original questions, indicating the text of questions changed subsequently (BH1992. 688.).

Where somebody is depicted in a press publication, without their consent, as if they were engaged in advertising a certain good, it also gives rise to correction. In the relevant case at hand, a daily newspaper published an image of the applicant artistic team in red frame by publishing advertising text within that red frame. The court agreed with the applicants that grouping the images taken of the applicants and the advertising text in question inside a red frame, separated from other press material, was capable of leading to the conclusion that the applicants promoted the products of the well-known business in Hungary. However, nobody can be used for advertising activities without their consent, therefore it infringes their personal rights and gives rise to correction if someone is displayed, without their consent, as if they are engaged in advertising in general or in connection with a specific product (BH1995. 509.).

v. Lack of Applicability of the Correction

In certain cases, this correction cannot put restrictions on the freedom of the press. Such cases have been developed also by the case law. The most important Position in this regard, the CC No 12, states that the expression of opinions, assessments and criticism, and the social, political, scientific, and artistic debate in itself cannot serve as a basis for correction. Specifically, no correction can take place if any eventual harm to personal rights is not made via a statement of facts. In the framework of social, political, scientific, and artistic debate, the Position states that published material on these subjects can contain statements of fact, with regard to which the subject of the debate is the true or false nature of the facts stated on the basis of the available background information or data. No correction can take place in such cases, since the court is not competent to adjudicate in a social, political, scientific, or

artistic debate. According to this Position, criticism and assessment is subject to a different type of examination if the press material incorrectly quotes the criticised person and thus makes false statements of fact or misstates facts in connection with personality of the person subject to criticism. However, in this situation, correction might be available.

a. Expression of Views, Assessment, Criticism

In a related case, the Supreme Court upheld the first instance judgment dismissing the applicant's action for press remedy (BH1989. 479.). Namely, the facts revealed by the court of first instance were true, that the applicant made a speech at an international peace conference, from which the newspaper article correctly concluded that the applicant disturbed that event. The court of first instance also rightly replied on the issue that the phrase 'speech violating the principles of democratic debate' used by the newspaper article was not a statement of facts but the assessment of an established fact. In the established case law, the expression of views, assessments, and criticism cannot, in themselves, be the subject of press remedy. The court was not competent to decide whether the chair of the conference was right to deprive the applicant from the opportunity to speak or not, since the court is not competent to decide in social or political debates, and it is out of the scope of a correction case.

It is not possible to correct value judgments, journalists' opinions, interpretations, or assessments via the press (BH1981. 402., BH1992. 308.), and no criticism of the acts of a natural or legal person can be the subject of correction if it fails to contain a false statement of facts or misstatement of true facts.[264] In the context of this distinction between statement of facts and expression of views, the Szeged Court of Appeal provides guidance in a specific case.[265] According to this, facts are part of the real world, an objective element of it, independent from human consciousness, a phenomenon, condition, event, happening, or act that existed or took place in the past, or exists or takes place in the present. On the other hand, an opinion is a subjective category—a position, value statement, or conclusion on a fact. The true or false nature of a fact can be proved or refuted, and although one can identify themselves with a view or distance themselves from it, the criterion of reality cannot however be linked to it.

The court referred to the judgment passed by the European Court of Human Rights in the case of *Csánics v Hungary*,[266] where the Court stressed that, 'statements of fact and value statements must be distinguished, in that while the existence of facts can be proved it is impossible in general to comply with a requirement to prove the truth content of value statements, and to provide for such requirement violates the freedom of expression.' In disputed cases, therefore, the boundary between statement of facts and expression of views can be drawn on the basis of the demonstrability test, according to which a statement's false or true nature can be proved, while the false or true nature of an opinion cannot be proved.

264 See, in line with this, BH1983. 354., [III]: 'Expression of views in itself will not give rise to correction. An opinion included in a press publication however, makes press remedy applicable if it is based on false facts, it expresses false facts in a disguised manner and/or misstates reality.'

265 BDT2012. 2653.

266 *Csánics v Hungary*, App No 12188/06, judgment of 20 January 2009.

The court examined the interview at stake on the basis of the foregoing, as a result of which it concluded that it contains the subjective views and position of the interviewed person. The interviewed person expressed his opinion on the circumstances motivating the termination of his employment, on the values represented by him and the employer's new management, the new atmosphere at the employer (challenging the lack of internal human characteristics), and also his feelings (fear on the part of the new management), the true or false nature of which cannot be proved objectively, therefore they are considered as an expression of opinions. In view of this, the Court of Appeal upheld the judgment of the court of first instance, dismissing the application for correction.

In another related case, the court concluded that no correction can be based on the defendant daily newspaper calling the applicant a notorious litigator. It was proved specifically that the applicant had brought a vast number of claims to various judicial bodies, therefore the challenged newspaper article published true facts on the litigation by the applicant. The phrase 'notorious litigator' is not a statement of facts, but the assessment of a behaviour reflected in the facts presented truthfully, with wording widely used by the public, therefore no successful press remedy can be claimed.[267] The court decided similarly in a case where it concluded that the assessment and criticism of a public actor politician's conduct cannot be subject of press remedy. The defendant weekly periodical in its article titled 'Private billions with state assistance? Organised above-world' classified the politician's behaviour reflected in facts described in accordance with the truth. The facts listed and detailed in the article, ie, that companies of the applicant's family, friends, and acquaintances received public money, were not disputed by the applicant. These items gave no reason for correction, since the conclusions and opinions classifying the behaviour of the politician were not arbitrary because they were based on undisputed facts, therefore on true bases (BDT2008. 1737.).

Insinuations in a press article cannot be the subject of correction, either. In a specific case, the applicant, a district municipality in the Capital, claimed that a written piece on leasing cases of municipal properties suggested to readers that the municipality failed to act by keeping the financial interests of the district in mind. In the court's view, however, a 'suggestion' is an individual conscious element and not a false statement of facts or misstatement of true facts as required by the law for a correction. Since the municipality failed to refer to any false statement of facts in its Statement of Claim, the court of second instance upheld the judgment passed by the court of first instance, dismissing the applicant's action for the publication of a correction (BDT2014. 3192.).

b. Information on Criminal, Administrative and Civil Law Cases and Disciplinary Proceedings

No correction can be requested if the press, before the final judgment is delivered, provides true information on criminal procedures since there are no laws excluding or restricting it. The Constitutional Court Position No 14[268] states that the procedure of criminal courts is public

267 BH1986. 272. For example of a similar case, see, BH1982. 89.

268 The original number of this Position was No 434 (BH 1984/5); renumbering was ordered by CC Position No 444 (13 June 1985; BH 1985/8).

in general and, in view of the educating effect of the procedure, it can be justified to extend the range of this publicity in order to inform the public. However, this Position adds that the facts must reflect the criminal case (the charge, the trial) appropriately. It cannot express prejudiced value judgments, and cannot identify the person so far only charged, undoubtedly and as a *fait accompli*, as the perpetrator of the crime. The true information on a first instance criminal judgment implies that it must be published that the judgment is not yet final. Where the criminal procedure is completed without a conviction, the Position derives from the law policy interest of the protection of personal rights that the press is required to inform its readers / viewers of this fact, free of charge, upon the request of the affected person.[269]

Here two cases are worth mentioning that held the press organ liable despite providing information on a criminal procedure. In one of the specific cases, the court upheld that where a pending criminal procedure cannot be completed because the affected person was granted immunity in the meanwhile (because of his election as Member of Parliament), the press organ cannot state that the person concerned is guilty on the basis of a first instance and not final judgment that held the person liable. In view of this the court ordered the paper to publish a correction.[270] In the other case, the defendant daily newspaper was ordered by the court to re-publish a correction that described, in the first correction, only the part of the criminal judgment that held the applicant liable, and at the same time, it was silent on the parts of the judgment that acquitted the applicant of certain other charges. The procedure followed by the daily newspaper in this way violated the truth by misstating it through not mentioning a certain fact in connection with other statements of facts. Furthermore, the daily newspaper failed to inform its readers of the fact that the judgment it described (in part) was not yet final. In view of the above, the court established that the partial description of that criminal judgment and the lack of information on its final nature violated reality, and so, it ordered the paper to re-publish the correction (BH1984. 353.).

It is worth noting that the above mentioned provisions of the CC Position No 14 on criminal procedure information was extended by the case law to information on administrative and civil law court cases and disciplinary procedures where the press publication complies with the state of the relevant procedure at the time of the publication. No press remedy can therefore be applied for in cases where the press organ informs on a fact established in a pending civil law, administrative law or labour law procedure (BH2004. 273., BH1986. 142., BH2002. 432., BH1992. 109.).

In a related case, the court did not find the applicant's action for correction well founded, because the press organ reported on disciplinary procedures conducted by certain employers in a true manner. A disciplinary procedure was initiated against the applicant in his 27th job, due to ice cream racketeering, in which context the dismayed applicant initiated publicity through the press, both on television and in the defendant's daily newspaper. The disciplinary procedure in question and the earlier procedures established that the applicant was lawfully found guilty. In his previous employments he had stolen melon and batteries, and in the latest procedure the fact that he was racketeering in ice cream was proved. In view of this, the defendant's daily newspaper article intended to highlight and criticise that the applicant tried

269 'A press remedy can be based on a press report which publishes only the conviction of a person who was convicted but rehabilitated' (BH1988. 98.).

270 BDT2011. 2481., Parts I and II.

to escape the consequences of his own errors by using democracy as a cover, and misusing the very important human right of reply. The court of second instance stated that, by mentioning the facts pertaining to the character of the applicant (the outcome of the earlier disciplinary procedures), the daily newspaper did not publish false statements or misstate true facts either (BH1983. 114.).

In line with the above, no press remedy can take place against a press publication factually reporting on a judgment imposing an economic fine as was upheld by the court (BH1988. 97.). The essence of the press report at stake was that the applicant reached an unfair advantage at the expense of its customers by charging an unfair price. According to the reasons given by the court, the statement of facts in the article was true and it contained no misstatement of true facts. Actors in economic life have to carry out their activities according to the requirements of sound management. Important social policy and economic policy interests justify that effective action is taken against unfair prices, even in the widening market. The imposition of an economic fine is the consequence of an unfair economic activity and the article reported on the imposition of an economic fine and the facts on which this fine was based. The press report in question related to the applicant's economic activity and corresponded to the final judgment made on the economic fine.

vi. Method and Content of Correction

Under the CC Position No 15 on the establishment of a corrective published notice,[271] the law sets no obstacles for the applicant to ask the publication of their own statement as correction. The applicant can enforce this claim in the press remedy action, where the court of the case establishes at its discretion the text of the correction, within the limits of the claim and the counterclaim. In particular, the court can decide to order the publication of the applicant's reply if the applicant requested this from the press before the court case.

The cited provisions of this Position were not a novelty in the case law. For example, before the formulation of this Position, the courts had already ordered that the injured party can request the publication of their letter of reply as a corrective public notice if it shows which statement of facts in the published material is false or misstates true facts.[272] If the press fails to publish the injured party's letter of reply, the injured party can request in their claim that the correction can be ordered within the scope of that letter. The court cannot order the press to publish a correction that goes beyond the claim enforced by the injured party within the statutory deadline. Furthermore, when establishing the text of the corrective public notice, the court must take any agreement between the parties on the manner of publishing that public notice into consideration.[273]

The form and content of a public notice suitable for correction is not determined in detail by the law. It contains only the provision that the corrective public notice must show which statement of facts are untrue in the challenged publication, which facts are misstated and/or

271 The original number of this Position was No 435 (BH 1984/5); renumbering was ordered by CC Position No 444 (13 June 1985; BH 1985/8).

272 BH1983. 354., [I]; BH1983. 151., [I], first sentence.

273 BH1983. 151., [I], second sentence, [II], and [IV].

which are the true facts. However, according to this Position, the press cannot be ordered to publish a declaration exceeding the extent required for the correction, either in its content or volume. At the same time, this Position stresses that it is not a proper way of correction when the press makes remarks on the corrective public notice, which confirm the content of the challenged published material or distort the correction. Therefore the text of the correction cannot be shaped in a way that leads to the loss of its corrective nature.

In general, the publication of the correction is unsuitable if remarks or other declarations are attached to it that confirm the challenged content of the published material.[274] In a related case, the court upheld that it cannot be considered as a suitable correction if the published letter of reply from the applicant fails to reach its objective as a result of the commentary made on it by a journalist, and loses its corrective nature. According to the facts on which this case was based, on the grounds of an article published under the title 'Everybody is incapable', the periodical published the letter of reply requested by the applicant under the title 'Not everybody is incapable', together with a journalist's opinion. Amongst others, the journalist commented on the applicant letter as follows: 'the ominous writing indeed plays off the applicant, but this is his fault rather than ours . . . a single sentence in the article on the attempted rape of his daughter is indeed not proven; we published it on the basis of the neighbours' statements.' The publisher of the periodical failed to prove the truth of the facts it stated against the applicant's claim, ie, that the applicant vandalised the furniture in the dwelling, and attempted to rape his daughter. The comments made to the letter from the applicant requesting correction confirmed the concerns of the journalist to the public, therefore the applicant's letter lost its corrective nature due to that commentary (BH1997. 174.).

In another case, the applicant requested the publisher of a daily newspaper to be ordered to make a repeated publication, because the daily newspaper expressed in the commentary made on the corrective public notice that it was only formally makes the correction, but it held its content to be unfounded, disagreed with it, and published it as the view of the applicant. The daily newspaper expressly invited its readers to decide for themselves whether the correction was right or not. In this way the correction published by the daily newspaper had lost its corrective nature, and failed to fulfil its statutory purpose. In the court's view, the applicant would have been right to challenge it, but the court also examined whether the daily newspaper could be ordered to make the correction and, since in this latter matter it concluded that the correction made voluntarily by the paper was not due, dismissed the action of the applicant (BH1999. 357.).

Correction fails to fulfil its purpose where the press organ publishes the declaration of the injured party refuting the false publication in such a way that the press organ fails to acknowledge its mistake, and fails to state clearly that its earlier statements were false. The publication of a statement containing the declaration by the affected person only means the negation of the truth of the statement of facts by the press, which is judged by the reader depending on his/her belief. The actual correction can only fulfil its purpose if, on the one hand, it provides authentic information, and on the other hand, it remedies the personal infringement caused by the publication of false facts through the press organ admitting its mistake, and clearly stating that its earlier statements were false. On the basis of this, the press organ exceptionally can fulfil the correction obligation by publishing the statement

274 BH1983. 151., [III].

made by the injured party if it is accepted by the affected person as a correction (BDT2010. 2230.). However, the injured party cannot demand press organ to publish a part of the letter citing their own words or the entire letter of reply if it goes beyond the necessary and justified content of a corrective public notice (BH1983. 276.).

In a press case, the text of the correction is set by the court. The correction fulfils its purpose if it clearly communicates the false nature of the challenged statement of facts and also indicates the true facts if necessary (eg, BH1990. 210.). The claim to specify the true facts is not a necessary element of the request for correction; this is only an option for the applicant (BDT2007. 1702.). The indication of the true facts in the corrective statement can only be requested if the challenged press report violated the truth in that regard. The publication of true facts can be claimed only to the extent it is necessary, according to public opinion to understand and interpret the falsehood and/or the misstatement of true facts (BH1985. 185.). It is therefore not necessary to repeat in full the content of the challenged published material, since this method would not serve properly the interests of the person enforcing a claim. With a view to defending personal rights, only the essential content of the unlawful published material violating the personal rights of the applicant must be communicated. In the text of the correction, unimportant details that only justify the correction do not need to be mentioned.

The court of second instance changed the text of the correction drafted by the court of first instance by taking the above criteria into account, because it was sufficient to suggest only that the labour case underlying the newspaper article was still pending, but it was unnecessary to detail the procedure (BH1990. 256.). The court similarly decided in a similar case by stating that, in the establishment of the text of the correction, it was not necessary to repeat the text causing the injury but only to indicate its actual content (BH1991. 390.). The extent to which it is justified to cite the facts (statements) causing the injury must be decided on the basis of the individual case's circumstances. Accordingly, the court did not consider it challengeable that the defendant radio station repeated the entire report programme affected by the correction when broadcasting the corrective statement. Contrary to articles published in a written paper, broadcast material is not available to be recalled by the public, therefore, for the purposes of identifying the programme and interpreting its correlation with the content, it might be necessary to recall the programme appropriately (BH1988. 96.).

The Position also mentions that the correction must be published within the set deadline and in a similar manner to that of the unlawful published material (for radio and/or television at the same time of day) since the correction can fulfil its purpose only if this provision is complied with. Hence, publication in other ways, such as in the 'Editor's messages' or in the 'Mail' column (BH1992. 388.), cannot be considered as suitable correction. However, it is irrelevant that the weekly periodical failed to publish the correction on the third page, at the top right side of it. The court did not find it justified to order the enforcement of the judgment since the weekly periodical published the correction otherwise in line with the judgment, in a prominent print, in a box (BH1990. 430.).

The case law replied to the question of in which issues the request for correction must be fulfilled. For daily newspapers, the correction must be published within eight days following the receipt of the request for correction if the claim is for the correction of material published in the monthly annex of that daily newspaper. In this regard, the court can also order that the corrective public notice is also published in the annex to that daily newspaper (BH1990.

469.). For weekly periodicals, in a specific case, the court upheld that if the request for correction is received after the cut-off time for an issue, the correction is not to be published in the issue published after that cut-off date but in one issue later (BH1991. 390.). For periodical papers, where the publisher is unable to publish the correction in the next issue due to printing technology problems, then at least it must publish in a prominent manner in the next issue that a press remedy will be published in the following issue (BH1993. 607.).

Where the false statement of facts relates to persons rendered in an image, in the correction it can be justified to order the defendant to re-publish that image, because the image and its caption jointly express the false nature of that statement of facts (BH1992. 456.).

vii. Bringing a Remedy for Action

The conditions for bringing a press remedy action are set out in the CC Position No 13. This action can be brought by the person entitled to request a correction, as detailed above. In line with the provisions set out in that Position, the court upheld in a specific case that an action for ordering a correction can only be brought if the person enforcing the claim has earlier requested the correction from the press organ within the required 30-day deadline by specifying the facts requested to be corrected (BH1993. 159.). This deadline is of a substantive law nature, therefore no *restitutio in integrum* can lie against it if missed. This thirty day deadline starts to run from the publication / broadcast of the published material.

However, in the event of failure to meet the above referred substantive law condition, the court cannot dismiss the action without issuing a process, since the assessment of the deficiencies in the preliminary procedure (ie, to examine whether the submission of the correction request was submitted on time) can take place only in the court's judgment. The Metropolitan Court of Appeal referred in a related decision to an earlier uniform court practice (BH1983. 15., BH1991. 196., BH1993. 59., BDT2003. 824.), ie, that the assessment of the preliminary procedure's defects and its correct completion takes place in the judgment of the court dealing with the case, therefore if the applicant was late in submitting the request for correction, the court shall dismiss the claim in its judgment. In a specific case, the court of first instance should have examined the publication date of an online publication, since this would have enabled it to decide whether the applicants met the relevant substantive law deadline (BDT2008. 1853.).

The day when the press organ received the document requesting correction must be taken into account as the time of communicating the preliminary claim. Namely, the press organ can only be in the situation to fulfil the correction request only after that date. This is the date from which the deadline set for the press organ to publish the correction is to be counted. Also, in accordance with that Position, a decision made in an individual case upheld that, for a press remedy dispute, the claim must be brought within 15 days from the last day of that publication's obligation (Article 343(3) of the Civil Procedure). Since the law does not prevent the parties from agreeing on a date for the publication of the correction, the deadline for bringing the action shall run upon the failure to comply with the deadline undertaken by the press to publish the correction (BH1985. 423.). This 15 day deadline to bring an action is of a procedural law nature, ie, if missed, an *in integrum restitutio* can be asked for, in line with the relevant rules of the Civil Procedure. This deadline is to be considered met if the action is sent as registered mail on the last day of the deadline.

If the applicant fails to meet the deadline for bringing the action and fails to verify the reasons for that failure, they can no longer enforce a claim for press remedy. The termination of enforceability of the claim for correction will not exclude the application of other measures for the protection of personal rights as specified by the law.

The Position mentions that the applicant can only request correction from the court in its press remedy action with regard to those facts that were indicated in its request received by the press organ within the 30 day deadline. If it were to the contrary, the press organ would be deprived of the opportunity to fulfil the correction of new claims submitted during the court case voluntarily. The eligibility of new claims in the court case would be contradictory to the general rules for the press remedy procedure, and would enable the deadlines set for the enforcement of the claims to be circumvented.

viii. Objective Liability of the Press and the Burden of Proof

The liability of the press for published material giving rise to correction is objective. It cannot be exempted from culpability even if the publication of false statements of facts took place inadvertently, due to the negligence of a journalist or the editor. The court accordingly ordered a publisher to pay a public interest fine in a specific case. In the court's view, the press cannot escape liability by invoking that it intended to provide information in a public interest case, and the false press information was published due to an unfortunate mistake (BH1993. 607.).

The key findings on the specific rules for evidence applicable in a press remedy procedure are set out in the CC Position No 14. This Position states that the person subject to the publication of statements of fact cannot be ordered to prove the falsehood of those statements of fact. Namely, demonstrating a negative circumstance is generally not possible or very difficult. For the protection of personal rights and the credible information of readers, it can be expected from the press that it will publish statements of fact, the truth of which it is capable of demonstrating.[275] With reference to this Position, the court established in the context of a specific case that, in general, the press organ is required to prove the truth of a press article which reports accurately on the statements of fact and declarations of others. The correction obligation cannot be circumvented by publishing false statements of fact not as certain but only as an assumption through allusions and references ('It might be a phantasy but the threads lead to the boss'; BH1990. 256.).

This Position recalls that the press organ is entitled to refuse to publish a correction requested in time only if the truth of the correction request can be refuted straight away. In the court case, the law transfers the burden of proof to the press organ through the provision that evidence can be only taken only for proof available at the trial, and can be suitable for demonstrating the truth of the publication's challenged statement of facts or for refuting the Statement of Claim straight away (cf, BH1986. 23.).

Furthermore, the court applies with increased strictness the provision of the Civil Procedure allowing a new statement of facts or submitting new evidence if the party appealing becomes aware of the new fact or evidence after the adoption of the first instance decision (Article 235(1)).

275 In a press remedy action, the truth of a press publication's challenged statements of fact is to be proved by the press organ, see, BH1992. 689., BH1993. 686., and BH1983. 354., [IV].

In a specific case, the court of second instance ignored the evidence submitted by the appealing defendant during the appeal procedure because the appellant failed to demonstrate in any form that they became aware of them only after the passing of the first instance judgment. Namely, the defendant submitted data from the public company register and information downloaded from a website as new evidence in the second instance procedure, but the defendant was not prevented from getting to know and use this information in the first instance procedure. Moreover, the defendant failed to become involved in the taking of evidence despite the court's invitation and made no motion for evidence either (BDT2014. 3192.).

For the purposes of the enforcement, ie, to maintain the credibility of the press and the protection of personal rights, the correction of false facts is also necessary if the communication comes from another source. Correction therefore applies to a press publication with false content or misstating true facts that otherwise accurately communicated the statement of facts or declaration of another person (entity), or takes over the published material of another entity (press organ). In this context, a specific court decision refers to this Position in upholding that the liability under the press law cannot be circumvented by publishing a false statement of facts with reference to the views of others. A general reference to the people providing the information and reference to the contents of other media are not suitable in themselves for demonstrating a fact stated in the press report at stake, that the revenues from the sale of the party headquarters were used by the applicants, the party leaders, for their own purposes (EBH2000. 297.). The court arrived at a similar conclusion in another specific case, where it explained, also with reference to that Position, that the press will not be exempted from the correction obligation if the presenter reports on bribes and misuses with reference to written notifications and rumours and not as its own statement (BH1989. 352.).

Press law liability cannot be circumvented by publishing a false statement with reference to information received for the interview subject. In a related case, the defendant daily newspaper published an interview on the life of families living in homesteads. In connection with the bad and difficult circumstances of families living there, there was the following statement by an interview subject: 'We were already told there that the GP says he will not come to help any more, even if a child dies. He was sitting here when he said it; even my mother in law can testify it.' The applicant GP requested a correction because he stated that he made no such statement as reported in the interview. Since the defendant paper was unable to demonstrate the truth of the described statement of facts, the court granted the action of the applicant (BH1990. 468.).

In another related case, however, the court found the applicant's correction request unfounded since the press organ was able to demonstrate by the testimony of the author of that article that the applicant, as the head of department of the Foreign Intelligence Department of the infamous ÁVH,[276] was present at the questioning of the author forty years earlier, when he encouraged the persons conducting the questioning to insult the author of the article. In the court's view, the circumstance itself that a witness heard in a civil law dispute states that the applicant was involved in the injuries suffered by him forty years earlier, and due to this he is angry with him, will not make the statement that he recognised the applicant on the basis of

276 The State Protection Authority (Államvédelmi Hatóság, ÁVH) was the defence body of the Hungarian Communist state party dictatorship, acting partly in intelligence, between 1948 and 1956. It was in charge of prosecuting the enemies of the regime and protecting the regime and its leaders.

contemporary images, and thus he verified that the applicant was present at his questioning as was stated by the interviewer back then to be ineligible. The court furthermore added that the biography of the applicant contains numerous references, statements of facts, and presentation, supporting the reasonable and justified testimony of the author's article (BH1992. 108.).

Since stating that someone gave a statement to the press is considered to be a statement of facts, the press is responsible for demonstrating that the applicants made the declarations the newspaper article attributed to them. Accordingly, in a remedy case related to an interview, the defendant was successful in proving that the testimony of the journalist, and the photographer and the notes made by journalists, and the applicants' statement recalling the events related to the interview and, last but not least, on the basis of the profile of the newspaper in question (a tabloid paper), the exclusive purpose of that interview was to reveal the applicants' private life relations. It was proved that the applicants made statements on this matter, but the applicants failed to prove that the interview was restricted exclusively to the professional career of one of the applicants. Since the newspaper article indeed failed to contain false statements, the court dismissed the applicants' action for correction. The fact that the defendant published the newspaper article despite the objection from one of the applicants was not relevant in the case for correction (EBH2004. 1021.).

The correction obligation of the press organ is not affected by the circumstance that the false statement was made at a public event on which the paper was entitled to report. According to the facts of the case in a related court case, the defendant paper reported in detail on the renewal general meeting of an association, where one of the speakers reported that censorship operates at a public service television station, since the head advisor to the Prime Minister (the applicant) has regular consultations with the editors on the content of the news. In the opinion of the defendant paper, on the one hand, a rumour exists amongst television journalists that the news editors consult with the applicant, on the other hand, the defendant only truly reported on an event, therefore the applicant cannot claim correction. The courts of first and second instance agreed with the arguments of the defendant and dismissed the applicant's action, since the defendant's report was true and made no remark or observation on the event's content, it did not confirm the statement of facts communicated, and therefore, the press organ was not liable for the content of the publication. If it were otherwise, the press would not be able to fulfil its statutory obligation to provide full, credible, and accurate information to the public. The Supreme Court dealing with the application for the review of the final judgment was of the opinion that the press is subject to objective liability for the truth of statement of facts published or passed on by word of mouth, and since the defendant was unable to prove the truth of the challenged facts, it was required to publish a correction, irrespective of whether it was entitled to report on a public event (EBH2000. 298.).

The press organ is not subject to prove the truth if it faithfully reports the content of the charges and the criminal court trial, and the non-final judgment, including the defence of the accused person. In other words, in a remedy case, it is not possible to prove whether the affected person committed the crime with which he was charged; deciding on this issue is the competence of the criminal court. The press organ cannot be exempted from demonstrating the truth, and therefore, press remedy is appropriate, where the press material is based on a criminal procedure, and a criminal judgment states false facts on a person or misstates true facts on them while they were not involved in that criminal case in any way (either as a suspect, as the accused, or as a witness; BH1985. 98.).

In the context of a specific case, the court upheld that the press is not obliged to prove the truth with regard to the subject of a procedure, where it reports faithfully on the procedures within the competence of the Parliament, local municipalities, national and local administrative bodies, and the judiciary bodies (EBH2001. 407.). Namely, it is an important social interest that the public is informed via the press on the procedures in the competence and the tasks and responsibilities of the above referred bodies. The court dismissed the applicant's action for correction on these grounds, since the defendant broadcaster accurately reported on the amending motion to the proposal for a decision before the Parliament that proposed establishing the liability of certain politicians, amongst them the applicant, for draining the revenues from the Russian-Hungarian oil trade, and for channelling them to private channels controlled by the persons referred. The court referred to the constitutional rule, under which the Parliament can set up a committee to deal with any issues, and the defendant broadcaster can report on it without the obligation to prove the truth. The Parliament and/or the specified committee thereof was competent to decide whether the liability of certain governments or politicians could be established for the activities called the 'oil saga', and therefore, in the case, it was only relevant whether the defendant's report complied with the content of the amending motion.

The press organ cannot be ordered to check the truth of the content of the statement of facts made at a police press conference. Accordingly, it will not violate the assumption of innocence and personal rights if, as was said at the press conference, it reports that criminal cases against the applicant subject to the procedure are pending for similar acts committed in the other parts of the country. A journalist is not entitled to question the statements of the police, or not able to investigate that information. No diligence requirement can be imposed on the press that cannot be fulfilled. Since the press organ reported faithfully on the press conference, it cannot be ordered to make a correction (BH2002. 51.).

D. Closing Thoughts

In connection with the review of the legislative background and the case law on correction, I wish to stress as an afterword that correction is a very important and specific but not the only instrument for the protection of personal rights. Neither substantive law nor procedural law obstacles prevent, depending on the nature of the infringement committed by the press, the injured party from claiming protection due to the infringement of other personal rights in parallel with the press remedy. For example, where the press material infringes good reputation or business reputation, the injured person can bring several claims for the application of sanctions as provided for by the Civil Code.[277] In an action brought for press

277 The person whose personal right was infringed can request (i) a court ruling, establishing that there has been an infringement of rights; (ii) to have the infringement discontinued and the perpetrator restrained from further infringement; (iii) that the perpetrator make appropriate restitution and that the perpetrator make an appropriate public disclosure for restitution at their own expense; (iv) the termination of the injurious situation and the restoration of the previous state, and to have the effects of the infringement nullified or deprived of their unlawful nature; (v) that the perpetrator or their successor surrender the financial advantage acquired by the infringement according to the principle of unjust enrichment; (vi) a claim for restitution of any non-material violation suffered; (vii) a claim for compensation (Civil Code, Articles 2(51)–2(53)).

remedy, no *lis pendens* occurs, and a final judgment on the correction shall not result in *res iudicata*, not even where the court cases are pending between the same parties on the same grounds, and a final judgment is made because the right enforced is different. In this context, for an identical factual basis, a judgment ordering the press to publish a correction can be relevant only in terms of choosing the manner of remedy (BH1996. 25.).

At the same time, the case law applies uniformly the rule for the benefit of the press organ; if the injured party of the personal right infringement fails to comply with the strict substantive and procedural law conditions, they cannot request the publication of a correction on the basis of another title, ie, under restitution (BDT2011. 2441.).

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